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II	*Findings or opinions of the courts below*—the opinions of the Supreme Court of Florida and the District Court of Appeal of Florida, Fourth District, have been previously submitted in the Appendix to the Petition for Writ of Certiorari filed in this cause.	
III	*The judgment, order and decision in question* is the opinion of the Florida Supreme Court which was previously submitted with the Appendix to the Petition for Writ of Certiorari filed in this Court. The Florida Supreme Court's opinion is located at pages 1A through 4A of said Appendix.	

RELEVANT DOCKET ENTRIES

1. Information filed February 17, 1969 (page 1 of record in Fourth District Court of Appeal).

2. Waiver of arraignment and plea of not guilty entered February 28, 1969 (page 6 of record on appeal).

3. Motion to suppress evidence obtained through unlawful search and seizure dated February 28, 1969 (page 8 of record on appeal).

4. April 15, 1969, order denying motion to suppress evidence seized without warrant (page 19 of record on appeal).

5. Relevant portions of deposition of Police Officer Paul R. Smith filed April 16, 1969 (commencing at page 103 of record on appeal).

6. Transcript of March 10, 1969, hearing filed April 22, 1969 (commencing at page 171 of record on appeal).

7. Order filed October 28, 1969, withholding adjudication of guilt and placing defendant on probation (page 283 of record on appeal).

8. Affidavit of insolvency and order filed October 28, 1969 (page 284 of record on appeal).

9. Notice of appeal filed October 28, 1969 (page 286 of record on appeal).

[103]

IN THE COURT OF RECORD IN
AND FOR BREVARD COUNTY, FLORIDA

NO. F69-33

STATE OF FLORIDA

Plaintiff,

vs.

JAMES E. GUSTAFSON

Indigent Defendant.

[Filed April 16, 1969]

The deposition of PAUL R. SMITH, taken before Emilie E. Richards, C.S.R., Notary Public in and for the State of Florida at Large at the Brevard County Courthouse, Titusville, Florida, on the 13th day of March, 1969.

APPEARANCES:

Mr. Dan Ciener, Assistant County Solicitor, Brevard County, Florida, on behalf of the State.

Mr. James M. Russ, Attorney at Law, Orlando, Florida on behalf of Defendant.

[104] THEREUPON

PAUL R. SMITH,

being duly sworn was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Russ) Tell me who you are and your occupation.

A Paul R. Smith, Police Officer, City of Eau Gallie.

* * *

Q Were you working on the night encompassing Saturday, the 11th of January and Sunday, the 12th of January of this year as a police officer?

A Yes, sir.

Q Did you have occasion to meet a man by the name of Gustafson?

A Yes, sir.

* * *

[117] Q To the best of your knowledge did any member of the Eau Gallie Police Department take him to a City or State Judge on January 12th?

A No, sir.

Q To your knowledge did any member take him to a City or State Judge for arraignment on Monday, the 13th of January?

A I don't know.

Q How about on the 14th?

A I don't know when he was taken.

Q You didn't take him?

A No, sir.

Q Did you have a warrant for his arrest?

A Did I, no, sir.

Q Did you make any effort to contact a Judge in connection with Mr. Gustafson's arrest?

A No, sir.

Q You had a flashing blue light on your Police Car, didn't you?

A Yes, sir, on the dash.

Q Did you use that in connection with stopping the white Cadillac?

[118] A Yes, sir.

Q You had no difficulty in stopping the Cadillac once you turned the blue light on?

A No, sir.

Q As I understand the Cadillac was traveling south on Babcock Street at the time you turned on your blue light?

A Yes, sir.

Q How far behind the white Cadillac were you at that time?

A Maybe 25 or 30 feet.

Q And where were you in relation to the corner of Babcock and Ultcht when you turned on the flashing blue light?

A Well, I would say about a little less than a city block from the corner of Ultcht.

Q Within that city block the Cadillac turned off to the right into the parking of the shopping center?

A Yes, sir.

Q And you pulled in behind him?
A Yes, sir.

Q Did you get out of your car?
A Yes, sir.

Q You were armed?
A Yes, sir.

Q Did you have a flashlight in your hand?
A I don't recall if I had the flashlight or not.

Q Do you have one in the car?
[119] A Yes, sir.

Q Describe it for me.
A It is a five cell flashlight.

Q How long it it?
A 10 or 12 inches.

Q Would it be more like 18 inches?
A I really don't know, 12 inches, 15 inches, it was a five cell.

Q Do you always carry your flashlight with you?
A Yes, sir.

Q Did you have to order the driver to get out of the Cadillac?
A Yes, sir.

Q Tell me where you were parked in relation to the Cadillac.
A I pulled directly in behind the Cadillac.

Q Directly behind it?
A Yes, sir.

Q Did you get out of your car on the driver's side?
A Yes, sir.

Q And you walked around to the driver's side of the Cadillac?
A I walked up to it.

Q Did you have your flashing blue light on?
A Yes, sir.

Q Were your headlights on?
[120] A Yes, sir.

Q Was your radio on?
A My radio stays on.

Q Was your engine turning over?
A It was running.

Q Did you have your gun pulled?
A No, sir.

Q Did you have your flashlight in your hand?
A I don't recall if I did or not.

Q Did you go to the driver's side of the Cadillac?
A Yes, sir.

Q Did you open the door?
A No, sir.

Q Did you touch the car?
A Did I touch it, no, sir.

Q Were the windows up or down?
A I don't recall.

Q Did you speak to the occupants of the car?
A He may have run it down.

Q Did you speak to the occupants of the car?
A I spoke to the driver, yes.

Q What did you say?
A I asked him to get out.

Q Do you know him to be a man by the name of James Gustafson now?
[121] A No, sir.

Q You don't know his name now?
A I know it now but I didn't at the time.

Q If you will listen to the question carefully, and answer it carefully I think we will come closer to the truth and get out earlier. You know the driver by the name of James Gustafson now?
A Yes, sir, I do.

Q When you told the driver of the car to get out what did the driver do?
A He got out.

Q Was the Cadillac running?
A I don't recall if it was running or not.

Q Were the headlights on or off?
A I don't recall.

Q How many people were in the car?
A Two.

Q Were there two persons in the front seat?
A Yes, sir.

Q One was to the right of the driver?
A Yes.

Q Did he appear to be a Caucasian male?
A Yes, sir.

Q Do you know him now by the name of Michael Moody?
A Yes, sir.

[122] Q Did James Gustafson appear to be a young Caucasian male?
A Yes, sir.

Q How was Mr. Gustafson dressed?
A I believe he had on a brownish jacket, sports jacket and dungarees.

Q Did he have a shirt on?
A Yes, sir.

Q What kind?
A I don't recall.

Q Did he have a tie on?

A I don't believe he did.

Q Were his clothes orderly or disheveled?
A They were very orderly.

Q Was his hair long or short?
A I believe it was long.

Q Was he clean shaven or did he have a beard?
A I believe he had a beard.

Q All over his face?
A I don't recall whether it was all over his face.

* * *

[123] Q As a matter of personal judgment do you believe that anyone who has got a mustache automatically needs a shave?

A No, sir.

Q Anyone that has a goatee automatically needs a shave.

A No, sir.

Q Do you agree with me that a man who has a day's beard all over his face, under his chin and nose, does need a shave?

A I would say so.

Q Using words in that line would this man need a shave?

A Sir, I don't know if it was all over his face or if it was a goatee, I don't recall, I don't recall if it was a goatee or mustache.

Q I am trying to ascertain if there was anything about the hair on his face that led you to believe he was unkept, disheveled, unclean, the vagrant type?
[124] A No, sir.

Q The hippie type?
A No, sir.

Q Did the man respond to your direction to get out of the car?
A Yes, sir.

Q Did he have any trouble getting out?
A No, sir.

Q Was he slow in getting out of the car?
A No, sir, I don't believe so.

Q Were you standing next to the door when he got out?
A Not next to the door, he opened the door and got out.

Q How far away were you?
A Maybe three or four feet.

Q Did you open the door or did he open the door?
A He opened the door.

Q When he got out of the car did he stand up?
A Yes, sir.

Q Did he have any trouble standing up?
A No, sir.

Q Did he say anything to you?
A No, sir, not at that time until I asked for hi license.

Q Did he appear to be frightened?
A No, sir.

Q Never?
A No, sir.

[125] Q Upset?
A No, sir.

Q What was the first thing you said?
A I asked for his driver's license.

Q Did he make any response to your request?
A Yes, sir.

Q What did he say?
A He said he didn't have a driver's license.

Q What did you do after that?
A I said you are under arrest for no driver's license.

Q Did you say anything further at that point in time?
A No, sir.

Q Did he make any response to you?
A If I am not mistaken he said his driver's license was at F.I.T.

Q What is F.I.T.?
A Florida Institute of Technology.

Q Is that an institution of higher education level in Brevard County?

A Yes, sir.

Q Did that man appear to be qualified that he could be a student in that institution?

A Yes, sir.

Q Would you say he was about 20 years old?

A Somewhere like that, yes, sir.

[126] Q Did you ask him if he had a registration slip for the car?

A No, sir, I did not.

Q Did you ask him if he had any other identification?

A No, sir.

Q Did you advise him that you were going to take him down to the Eau Gallie City Jail?

A Yes, sir.

Q Did you observe him to go around the Cadillac to the passenger side?

A No, sir.

Q Did you observe him open the door on the passenger side?

A No, sir.

Q Did you observe him go in the glove compartment of the Cadillac?

A No, sir.

Q Do you recall him telling you that he did not have with him the registration for the car?

A No, sir, I do not.

Q Do you recall him telling you that he had just purchased the car from a lady?

A I do.

Q Do you recall him telling you that he had the lady's name in the glove compartment?

A Yes, sir.

[127] Q Do you recall him looking around the glove compartment for the paper or card that had the lady's name?

A No, sir, I do not.

Q Did you ever tell Mr. Gustafson that he was stopped or pulled over by you because he was driving all over the road and because when he saw you he pulled off and went through the alley?

A Repeat that.

MR. RUSS: Would you read the question.

(Thereupon the foregoing question was read.)

A Yes, sir.

Q That was the basis for turning on the blue light wasn't it?

A Yes, it was.

Q Had you stopped any other cars that night with the blue light?

A I believe I had, sir.

Q How many?

A Two or three possibly.

* * *

[128] Q Are you out on patrol like this every night?

A For one month, we change every month, when I am on my month I am out.

Q On the months that you are on days are you out on patrol during the daytime?

A Yes, sir, I would say two-thirds of the time.

Q Tell me this, why did you stop these other cars that particular Saturday night?

[129] A I believe, if I am not mistaken, I wrote two corrections.

Q What is this?

A Tail light, headlights, brake lights and so forth.

Q When you write up corrections do you turn them in?

A Yes, sir.

Q Who do they go to?

A Captain Yeager.

Q Who is he?

A He is Captain of the Patrol Division.

Q Is there a follow up to ascertain if these people get the correction done?
A I don't know.

Q Is there a form you use to write up these corrections?
A Yes, sir.

Q You give one part to the person stopped?
A Yes, sir.

Q And you turn the other part into Captain Yeager?
A Yes, sir.

Q Do you keep any part for your own use?
A No, sir.

Q Did you stop anybody that particular night for any reason other than to give correction slips?
A I don't believe so.

Q In the instance of people stopped for correction slips do you check their driver's license?
[130] A Yes, sir.

Q Were they produced?
A Yes, if they have it they do.

Q Were they produced this particular night?
A Yes, sir.

* * *

[133] Q Going back to the night in question, the two people you stopped, these people had faulty equipment?
A I believe they did.

Q Either their tail lights were not working or their headlights were out or something like that?
A Yes, sir.

Q Did you arrest either of these people?
A No, sir.

Q Did you take either of these people down to jail?
A No, sir.

Q So far as you know is it illegal and against the law to operate a motor vehicle with bad headlights?
A Yes, sir.

Q Is it against the law to operate a motor vehicle with faulty tail lights?
[134] A Yes, sir.

Q A person that does that is subject to being arrested?
A They can be.

Q And taken to jail?
A Yes, sir.

Q And required to post bail?
A Yes, sir.

Q And submit to search?
A Yes, sir, if they are arrested.

Q Before you stopped the white Cadillac you had observed it to some extent going from one lane to another, is that right?

A Yes, sir.

Q Tell me again where it was that the Cadillac caught your attention.

A North of Ballard Drive and Harbour City Boulevard, which is U.S. 1.

Q How far is the intersection of U.S. 1 and Ballard Drive and U.S. 1 and Ultcht?

A About three-quarters of a mile, maybe.

Q Were you traveling north or south when the car caught your attention?

A Traveling south.

Q At that time when you first made contact was the Cadillac driving along in front of you?

A Yes, sir.

[135] Q Was it violating the speed law?

A No, sir.

Q I believe you said the other day that there was no particular traffic parked in the right hand parking lane?

A No, sir.

• • •

[137] Q As I understand you were traveling south and came behind this white Cadillac?

A Yes, sir.

Q And I assume, being a police officer, you were not violating the speed limit.

A No, sir.

Q Therefore if you were not violating it the white Cadillac was not violating the speed limit?

A No, sir.

Q How far did you stay behind the white Cadillac before it turned off of U.S. 1?

A About three-quarters of a city block, going through the intersection of Ballard Drive and U.S. 1 and turned right beside the Winn-Dixie Food Store.

* * *

Q During the course of the three-fourths of the city block that you were behind the Cadillac I believe you testified [138] you observed it to weave.

A Yes, sir.

Q It was essentially in the center of the lanes, two of which being the proper traffic lanes and the third lane on the right the parking lane?

A Yes, sir.

Q You observed the car to weave over the center line into both adjacent lanes?

A I believe I said across the center line into the passing lane.

Q You said it was possibly no more than the width of the tire?

A I don't know, I said it was probably half the car.

Q All you know is it went over the center line?

A Yes, sir.

Q You don't know how far?

A No, sir.

Q It could have been a little bit?
A Yes, sir.

Q And this drew your attention to the Cadillac?
A Yes, sir.

Q I believe you said as it went down U.S. 1 before it turned right the occupants turned around and looked at you?
A Yes, sir.

Q And you observed them to be young Caucasian males?
[139] A Yes, sir.

Q And the driver at least had long hair?
A I don't believe I said he had long hair I said two white males.

Q He did have long hair?
A Yes, sir.

Q Did that turn your attention to the car?
A The weaving there?

Q The whole thing, the driver, the weaving, the hair?
A I didn't know who was in the car but two white males.

Q Did they appear to be young?
A Yes, sir.

Q Did you decide then to stop the car?
A At that point?

Q Just as you were going down U.S. 1?
A Yes, sir.

Q You thought you would stop and check it out?
A Yes, sir.

Q Based on the weaving?
A Yes, sir.

Q And based on the appearance of the occupants?
A Not on the appearance, no, sir.

Q Would you have stopped that car if you had recognized the occupants of the car?
A If I had recognized them, no, sir, if it hadn't been [140] weaving I wouldn't have stopped it.

Q Assuming a car was moving on the same course that you saw this car and you recognized the occupants would you stop the car?
A No, sir.

Q Assume you observed the weaving there and it was 2 o'clock in the afternoon with the same occupants in the car would you have stopped the car?
A I would have stopped the car if it was weaving.

Q Didn't you tell me a minute ago you wouldn't have stopped the car if you recognized the occupants?
A I didn't recognize the occupants.

Q I know that, I am trying to ask you if you would have stopped the car if you had known the occupants. Say, for example, the two faces that turned around and you

recognized the driver as being Robert Cotron and the man next to him as Captain McCarthy would you have stopped the car?

A No, sir, that's because—

Q You would have known the occupants?
A Right.

Q And the same thing that we have been talking about if they had turned around and it had been the faces of Cecil Rosier and Joe Cowart, you wouldn't have stopped the car?

A I would have if it was weaving.

Q Do you stop every car that crosses the center line?
[141] A Weaving into the right side, I know I checked my records the other day and I said it went to the right side in the parking lane.

Q Didn't you testify it didn't go in the parking lane?
A No, sir, I did not.

Q You don't know that that car went over that line as much as a tire width or half of a tire width?

A No, sir, the only thing I know is it went over the center line.

Q That is not a crime, is it?
A Yes, sir.

Q It is?
A Careless driving by weaving, yes, sir.

Q You arrested him for careless driving by weaving?

A No, sir, I did not.

Q Tell me why you didn't.
A Because I stop cars—

Q No, this car, you told me that you were going to stop this car regardless if Robert Cotron was driving it or Joe Cowart was driving it, it made no difference you were going to stop this car.
A For the weaving.

Q Ultimately you did stop this car?
A Yes, sir.

Q Did you charge him for careless driving by weaving?
[142] A No, sir.

Q Tell me why.
A I didn't, he could have been sleepy, or drinking.

Q You mean to say that it's a crime—
A If I stop them if they are sleepy I have them get coffee and talk to them and then they are gone.

Q You don't charge them then?
A No, sir, I don't.

Q Did you tell Judge Cowart the other day under oath that as far as you were concerned there wasn't enough to make a charge of careless driving by weaving.
A I did.

Q You are telling me that you were going to stop this car because of this and at the same time you are telling me there was not enough there to place the charge against the driver.

A There was not enough weaving in my opinion to book him on careless driving.

Q Tell me how do you justify stopping these people and yet there is not enough there to place a charge?

A If a man crosses the center line and comes back to the right continually he is booked for careless driving by me.

Q That was not the case?

A No, sir.

Q You observed the car going for three-quarters of a block and turning off of Ballard to Laurie all right?

[143] A Yes, sir.

Q They didn't violate any traffic law?

A No, sir.

Q Then they continued traveling south on Babcock at Laurie?

A Yes, sir.

Q At this time you were right behind him?

A Maybe 200 feet behind him.

Q To this point in time you hadn't turned on your blue light?

A I had not.

Q You traveled from Laurie down passed Circle Avenue?

A Yes, sir.

Q Did you observe a police car at that intersection?

A I did not.

Q Did you see Officer Levy anywhere in a police car that night?

A Yes, sir, I did.

Q Before you stopped the Cadillac?

A No, sir, I did not.

Q Did you make a radio transmission to Officer Levy before you stopped the Cadillac?

A I did.

Q What did you tell him?

A I asked him if he saw a white Cadillac traveling south [144] on Babcock.

Q Did you see Officer Levy at that time?

A No, sir.

Q Did you know where he was?

A No, sir.

Q Why did you ask him did he see the white Cadillac?

A I knew he was supposed to be on Babcock Street checking doors but where I didn't know.

Q Did you call the dispatcher at that time?

A Yes, sir.

Q What did you tell him?

A I told him I was going to stop a car such and such a tag number and location.

Q At the time you made the transmission you felt the car was trying to elude you?

A No.

Q At the time you made the radio transmission?

A No, sir, I made the radio transmission on Babcock.

Q You had come out of the alley way between U.S. 1 and Babcock?

A Yes, sir, I come off the alley way at Babcock and Laurie.

Q That's between U.S. 1 and Babcock?

A Yes, sir.

Q That is what I asked you.

[145] A Yes, sir.

Q At that point in time did you believe that this car in coming off of U.S. 1 through the alley way to Babcock was trying to elude you?

A Yes, sir, that's what I thought, he was trying to elude me.

Q And that made you suspicious?

A Naturally.

Q So you concluded you would stop the car?

A No, sir, I stopped the car because of the weaving.

Q The fact that the car went through the alley had nothing to do with stopping the car?

A No, sir.

Q Why didn't you turn the blue light on between the point when you first saw it on U.S. 1 and the point where it turned off of U.S. 1?

A Why didn't I, I didn't feel like I should, I thought I would wait until I got on Babcock.

Q All of the weaving took place on U.S. 1?

A Yes, sir.

Q There was no weaving on Babcock?

A No, sir.

Q And you knew that Ultcht Street was ahead of you?

A Yes, sir.

Q And you knew that was the city limits?

[146] A Yes, sir.

Q And you knew you had no arrest power except in hot pursuit beyond the city limits?

A I didn't, I can follow a car into Melbourne and arrest it.

Q On hot pursuit?

A Yes, sir.

Q This has to be for an offense committed in Eau Gallie?

A Yes, sir.

Q And did you observe any offense committed in Eau Gallie?

A Yes, sir, I did.

Q What was that?

A The weaving.

Q But you told me at least four or five times this afternoon the weaving was not sufficient to constitute the offense of rackless driving.

A Right.

Q The mere weaving back and forth doesn't constitute an offense?

A Weaving back and forth, yes, sir, it does.

Q Did you see the actual offense of careless driving that night by this Cadillac or didn't you?

A There was not enough weaving for careless driving in my opinion.

Q You didn't see an offense committed by the driver of the [147] Cadillac in Eau Gallie?

A Yes, sir, I did, careless driving by weaving.

Q Didn't you just say you didn't see this happen—

A The weaving took place in the city limits in Eau Gallie and it could have been a charge of careless driving by weaving.

Q Did you see enough weaving to constitute a charge of careless driving by weaving?

A I did.

Q Why didn't you charge careless driving by weaving?

A I didn't want to.

Q Didn't you tell the Judge that you didn't see enough weaving to constitute an offense?

A I told him in my opinion that it was not enough weaving to constitute a careless driving by weaving charge.

Q You stated that you determined to stop him because of the weaving?

A Yes, sir.

Q But yet you didn't arrest him or charge him with careless driving by weaving because there was not enough evidence?

A In my opinion not enough weaving?

Q What I just said is that right?

A To my opinion there wasn't enough weaving, sir.

MR. RUSS: Read my question back.

(Thereupon the Court Reporter read the following question. "But yet you didn't arrest him or charge him with careless [148] driving by weaving because there was not enough evidence.")

A No, sir, there could have been evidence but I didn't charge him.

Q Do you know the difference between evidence and charge?

A No, sir.

Q When you accuse somebody of an offense or a crime what is that?

A When you accuse somebody of an offense what is that?

Q What is that?

A That is evidence for the case.

Q Okay.

A It's a charge but you got to prove it.

Q Is it a charge or evidence?

A It is a charge the same as you accuse somebody.

Q And when you see somebody doing something, what is that?

A It is a crime.

Q I am sitting over here in this chair, is this a crime?

A It is according to what you are doing.

Q When you see somebody doing something what is that?

A Evidence that they are doing something I guess.

Q You say that you didn't see Mr. Gustafson go around to the glove compartment, is that your testimony?

A Yes.

Q You are sure about that?

A Yes.

[149] Q Did you ask him for any identification?

A Other than his driver's license, no, sir.

Q After you asked him for his driver's license, did you observe him rummaging around in his pockets?

A No, sir.

Q Did you observe him put his hands in his pockets at all?

A I don't recall, sir.

Q Think hard.

A I don't believe so.

Q Think hard and give me a good honest answer.

A To the best of my recollection I don't believe so.

Q Does it sooth your conscience when you fall back on "I don't remember", "I don't recall"?

MR. CIENER: I object to that.

Q Did you see Mr. Gustafson put his hands in his pockets after you asked for his driver's license?

A No, sir.

Q Did you specifically tell him, "Mr. Gustafson, you are under arrest for not having a valid driver's license in your possession."

A Not in possession, no driver's license.

Q Is that what you told him?

A Yes, sir.

Q Tell me what you told him?

A I told him you are under arrest for no driver's license.

[150] Q When in point of time did you tell him that?
A When he told me he didn't have a driver's license.

Q Is this when he told you that the driver's license was back at the University?
A After I placed him under arrest, yes, sir, he said it was at the F.I.T. school.

Q Did you make any effort to verify the license back at the school?
A No, sir.

Q How far was the school from the point of arrest?
A I have never been to the school.

* * *

Q Did you know it was within the city of Melbourne?
[151] A I heard it was in the City of Melbourne off of Babcock Street.

Q At the point of arrest you were a matter of maybe 100 feet of being in Melbourne?
A 100 to 150 feet.

Q You were already on Babcock Street?
A In J. M. Fields parking lot.

Q Off of Babcock Street?
A Yes, sir.

Q How many feet off?
A How many feet off?

Q It was not more than 50 feet off of Babcock was it?
A Probably not any more.

Q Tell me this, tell me who the last person was that you took down to the Eau Gallie jail for not having a driver's license before the Gustafson arrest?

A I couldn't tell you who it was.

Q Or when it was?

A No, sir.

Q Tell me during the calendar year 1968, your best approximation, as to the number of people you took in custody and took to the Eau Gallie jail because they didn't have a valid driver's license in their possession.

A In '58?

Q In '68.

[152] A I would say around 20 or 25, that's an approximation.

Q You took all these people down in your police car?

A Not all of them now.

Q No?

A No, sir.

Q How many did you take in your police car?

A I would say an average of 10 or 15.

Q Out of the 25?

A Out of 25.

Q Did you search all the 25 that you arrested for not having a driver's license in their possession?

A If they go in my patrol car I do.

Q You told us the other day that your search of Mr. Gustafson consisted of patting him down on the outside?

A Outside and inside, I checked the belt, the shirt pockets and all around the belt, completely around inside.

Q Did it involve putting your hands in Mr. Gustafson's pockets?

A No, sir.

Q After you patted Mr. Gustafson down you put your hands in his pockets?

A His coat pocket.

Q Which coat pocket?

A The left.

Q Why did you put your hand in his coat pocket?

[158] A I took a package of cigarettes out.

Q I want to know why you put your hand in his pocket?

A To see what he had in his pocket and remove it.

Q Did you put your hand in his right coat pocket?

A No, sir.

Q Did you put your hand in his shirt pocket?

A No, sir.

Q Did you put your hands in his right trouser pocket?

A No, sir.

Q Did you put your hands in his left trouser pocket?

A No, sir.

Q Did you put your hands in his left back pocket?
A No, sir.

Q The right back pocket?
A No, sir.

Q Did you put your hands in the inside coat pocket, the vest pocket?
A No.

Q Did you remove a box that you said was Benson-Hedges out of his left pocket?
A Yes, sir.

* * *

[155] Q When you tell me that he had no valid driver's license on his person did you consider the statement that he made to you in reaching this conclusion?
A Read that again.

MR. RUSS: Would you read the question.

(Thereupon the Court Reporter read the foregoing question.)

A Yes, as far as I know he told me he had no driver's license.

Q You considered that statement in placing him under arrest for having no valid driver's license?
A Yes, sir.

Q You didn't go through his pockets and determine whether or not he had a driver's license in his pocket?
A I didn't.

Q You didn't go through the car to see if he had a valid driver's license in the car?

A No, I did not.

Q You had observed him driving the car?

[156] A Yes.

Q And you asked him to produce a driver's license?

A I did.

Q And he told you he didn't have it with him?

A He said he didn't have a driver's license.

Q He said he didn't have a driver's license?

A Right.

Q And it was based on that that you place him under arrest?

A Yes, sir.

Q How far is it from Laurie Street and Ultcht along Babcock?

A I would say approximately from Laurie to Ultcht on Babcock is about one-half a mile, I believe.

Q Why did you allow that Cadillac to drive a half a mile down Babcock before you pulled it over?

A So he would pull up in the J. M. Fields parking lot.

Q Any other reason?

A I didn't follow him that distance with the light on, sir.

Q I didn't ask you that.

MR. RUSS: Will you read the question back.

(Thereupon the Court Reporter read the last question. "Why did you allow that Cadillac to drive a half mile down Babcock before you pulled it over?")

A I just followed him to J. M. Fields parking lot, sir.

[157] Q Why didn't you stop him before that?
A I didn't.

Q I know that, I want to know why.
A I wanted to follow him and call in and tell them that I would be 10-50 at Fields parking lot and that's where we went.

Q Why didn't you stop him before then?
A I just didn't.

Q There is no reason for it?
A No reason.

Q You didn't consider his driving to be hazardous to other drivers?
A Not on Babcock, no, sir.

Q What you had seen went back to when he was up on U.S. 1?
A It could have been.

Q You didn't consider this driver to be hazardous to the safety of other people who might be on the road?

A No.

Q You didn't consider his driving might be dangerous to other cars on the road?

A There were no cars on the road.

Q You didn't consider this driving dangerous to any property that may be adjacent to the road?

A No, sir.

Q There was nothing about this driving that caused you to be in a great hurry to stop this Cadillac?

[158] A No, sir.

Q Does Babcock from Laurie to Ultcht run through a business section of Eau Gallie?

A The Babcock Plaza is there.

Q And this Cadillac drove properly by Babcock Plaza?

A Yes, sir.

Q Was there an opportunity there for the car to drive off of Babcock on to the parking lot?

A Yes.

Q Is there any place else besides Babcock Plaza that the car could have driven off of Babcock into a parking lot before Ultcht?

A At the Chips and the Gulf Station.

Q Let me ask you this, you have had training on how to search people before taking them in police vehicles?

A Yes, sir.

Q What has your training taught you about how to go about this?

A To search a subject I put him against my car, his hands on the car and his feet back and I pat down over his body down his pants, down his shoes and then I check the outside coat pockets.

Q Is that what you did in connection with James Gustafson?

A Yes, sir.

Q You followed that same technique?

[159] A Yes, sir.

Q You had him place himself against the car?

A Yes, sir.

Q He was kind of spread out so he would be propped up against the car with his hands—

A On the car.

Q His legs were spread apart?

A Yes.

Q After you searched him did you place him in your car?

A Yes, sir.

Q Immediately?

A Yes, sir.

* * *

[160] Q What did you tell Mr. Levy?

A I put Gustafson in my car and I told Levy to check Moody and see if he had a driver's license and to let him to drive the car back to the station.

Q Let who?
A Moody.

Q Did you get Moody out of the car?
A Moody got out of the car.

Q Before you put Gustafson in your car did you get Moody out of the car?
A Moody got out after I got Gustafson out.

• • •

Q Did you search Moody?
A Yes, sir.

Q Had you arrested him?
A No, sir.

Q Not for anything?
A I didn't arrest him for anything.

Q How about aiding and abetting a person driving without a valid license?
A I didn't arrest him.

[161] Q You did search him?
A Yes.

Q Did you place him against the car?
A I don't recall if I patted him down standing up or against the car.

Q You did pat him down?
A Yes.

Q You didn't go through his pockets?
A No, sir.

Q This was before you decided that he, Moody, was to drive the car down?
A Before?

Q Yes, sir.
A Not before, I put Gustafson in my car at that point. I opened the box of cigarettes.

Q We will get to that point, before you put Gustafson in your car you checked out Moody, searched him?
A No, sir, I had Gustafson in my car I put him in the back seat of the car.

Q And then you got out?
A I didn't get in, I put him in and walked around to Moody there.

Q And then you frisked him down?
A Right.

Q You then told Levy to tell Moody to drive the Cadillac [162] down to the station, is that right?
A Not after I frisked him, no, you are not letting me go through it.

Q And you know why, you can't tell it straight twice in a row, that is why. Where was Moody, did you tell Moody to drive the car to the station?
A I told Officer Levy to check and see if he had a license and let him drive it down.

Q Did you tell Moody to drive the Cadillac down?
A No, I didn't.

Q Where were you when you told Mr. Levy to check Moody's license and if he had one to allow him to drive the car down to the station?
A I had put Gustafson in the back seat of my car.

Q Was that before or after you searched Moody?
A That was before I searched Moody.

Q Did Levy report back to you that Mr. Moody had a license?
A He did not.

Q Did he state one way or the other?
A No, sir.

Q After you told Levy to check out Mr. Moody license, you then went and patted down Mr. Moody?
A No, sir, I did not.

Q Did you pat down Mr. Moody before or after telling Levy to check his license?
[168] A After I told Levy to check his license I patted down Moody.

Q At that point did you tell Mr. Moody and Levy for Mr. Moody to drive the car down to the station?
A No, sir, I didn't.

Q What did you tell Levy as to how the car was to get from the parking lot to the station?

A I told Levy after I put Gustafson in the car not to let Moody drive the car that I had marijuana and the car was locked up and the keys were in my pocket, put in my pocket.

Q When did you tell Mr. Levy to let Mr. Moody drive the car?

A Before I opened the cigarette that I had in my possession from Gustafson.

Q When in terms of putting Gustafson in the car did you tell Levy—

A I put him in the car and I opened the box.

Q I don't give a damn about when you opened the box, when did you tell Levy to check out Mr. Moody?

A I put Gustafson in my car—

Q It was at that point that you then looked in the box?

A I opened the box.

Q And there were rolled cigarettes that you thought were marijuana?

A Yes.

[164] Q And you got back out of your car?

A I was never in my car, I was at the back door.

Q You came away from your car?

A Yes.

Q And you told Mr. Levy, no, he can't drive the car?

A Not at that point.

Q You walked over to Mr. Moody and shoook him down?

A After I told him not to let him bring the car in.

Q I want you to tell me what you did immediately after you looked in the box that you had in your hand?

A Immediately after I told Levy don't let him get in the car?

Q What did you do immediately after that, after you got through saying this to Levy?

A I went around and searched Moody and put him in my car.

Q Did you have a search warrant for Moody?

A No, sir.

Q Was he under arrest?

A No, sir, I was taking him in for investigation.

Q For what?

A Possession of marijuana.

Q You have authority to take people in?

A Yes, sir.

Q You have authority to search them?

[165] Yes, sir.

Q A search incidental to investigation?

A Yes, sir.

Q Once Moody got out of the car and you searched him he never got back in the Cadillac?

A No, sir, he didn't.

Q He got out of the Cadillac about the same time that Mr. Gustafson got out?

A A little after Gustafson got out of the Cadillac he got out and came around.

Q Was Mr. Gustafson in custody for investigation of marijuana, too?

A Yes, sir.

Q And you took them both down to the station?

A Yes, I did.

Q Because you wanted to investigate the marijuana possession some more?

A Yes, sir.

Q You wanted to question them?

A I didn't want to question them, I turned them over to Lt. Mitchell.

Q So he could question them?

A Yes, sir.

Q Have you been to the Bureau of Narcotics School conducted by the United States Treasury Department in Washington?

[166] A No, sir.

Q Have you worked in the field of vice control?

A No, sir.

Q Do you feel that you are competent to identify marijuana when you see it in the sense of being an expert?

A In being an expert, no, sir, I am not an expert.

Q Is that why you contacted Lt. Mitchell so he could come and examine it?

Q Yes, sir.

Q And he did examine it?

A He did.

Q You were not absolutely sure that it was?

A It appeared to me to be marijuana.

Q But you were not absolutely sure?

A Not until he told me so.

Q Until Lt. Mitchell told you?

A No, sir, Mr. Gustafson.

Q Mr. Gustafson?

A Yes, sir.

Q Tell me about that.

A That's what I was getting to. As I put Gustafson in the back seat of the patrol car I opened the Benson-Hedges box and I said this appears to be marijuana to me and he looked at me and said, "It is."

Q At the time you placed him under arrest did you advise [167] him he had the right to remain silent?

A At the time, no, sir, I did not.

Q Did you tell him that anything he said while in custody could be used against him in a court of law?

A No, sir.

Q Did you advise him prior to making any statements that he had the right of legal counsel?

A I did not.

Q Did you advise him he had the right of legal counsel and if he was financially unable to obtain legal counsel that legal counsel would be provided for him without charge?

A I did not at the time of arrest.

Q Had you told him that prior to the time you looked at the contents of the Benson-Hedges box?

A No, sir.

Q Had you told him that prior to the time that you said it looked like marijuana to you?

A No, sir.

Q Had you told him that prior to the time he replied, "It is."

A No, sir.

Q Did you interrogate him any further from the shopping center to the station?

A No, sir.

Q Did you talk to him at all?

[168] A I don't believe so.

Q You didn't ask his name?

A No.

Q How old he was?

A No.

Q Where he lived?
A No.

Q Was Mr. Moody under arrest?
A I never did place him under arrest, no.

Q Let me ask you this, what would you have done if Mr. Moody refused to get in the police car?
A What would I have done?

Q Uh-huh.
A I wouldn't have done anything.

Q Would you have used force to get him in the police car?
A I never had arrested him, if he became belligerent I could have arrested him.

Q Would you have done so?
A Yes, sir.

Q And forced him to get into the police car?
A If he got belligerent.

Q You told me you searched him and told him to get in the police car?
A Yes, sir.

Q What would you have done if he said, "No, I am not going [169] to get into the police car."
A I would have probably have arrested him for disorderly conduct.

Q You feel that if a person refuses to do what a police officer tells you to do it constitutes disorderly conduct?

A Yes, sir.

Q You had the legal right to tell Mr. Moody to get into the police car?

A Yes, sir.

Q After you arrested him for disorderly conduct and he still refused to get into the police car what would you have done?

A I would have put him in the police car.

Q Forcibly?

A Yes, sir.

MR. RUSS: I have no further questions.

MR. CIENER: No questions.

FURTHER DEPONENT SAYETH NOT.

/s/ Paul R. Smith

(Court Reporter's sworn certificate dated 3/28/69 omitted in printing)

* * *

[171] IN THE COURT OF RECORD, IN AND FOR BREVARD COUNTY, FLORIDA

F69-33

STATE OF FLORIDA,

Plaintiff,

-vs-

JAMES GUSTAFSON,

Defendant,

[Filed April 22, 1969]

Transcript of the testimony held on March 10, 1969, at the Brevard County Branch Courthouse, Rockledge, Florida, before Judge Joe A. Cowart, Jr.

APPEARANCES:

MR. DAN CIENER, Assistant County Solicitor, in and for Brevard County, Florida, for the Plaintiff

MR. JAMES M. RUSS, Attorney at Law, 441 First Federal Building, Orlando, Florida, for the Defendant

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[178] THEREUPON,

PAUL R. SMITH,

was sworn and testified on his oath as follows:

DIRECT EXAMINATION

Q [By Mr. Ciener] State your full name.
A Paul R. Smith.

Q Mr. Smith, whom are you employed with?
A City of Eau Gallie.

THE COURT: Before you proceed let's get the record clear. Miss Reporter, if you will, let the record show this is the State versus James E. Gustafson, F69-33, Court of Record and that this is a hearing on the motion of the Defendant to suppress evidence obtained in an unlawful search and seizure and that the Court, in conference with counsel, indicated that since the allegedly seized evidence is not claimed to have been seized pursuant to the search warrant the Court has indicated the burden to come forward is on the State to show the property seized and to show a more factual basis for the search warrant and Mr. Ciener has acquiesced to come forth with it here.

Q [By Mr. Ciener] Lieutenant Smith, I'd like to first call your attention back to Sunday morning, approximately 2:00 a.m., the morning of January 12, 1969; were you so employed on that day as you are now?
A Yes.

[174] Q Do you know a person by the name of James Gustafson?

A Yes.

Q Do you see him here on this room?

A Yes [indicating].

MR. CIENER: Let the record reflect the witness identified the Defendant.

Q [By Mr. Ciener] Let me call your attention back to January 12, 1969, did you have occasion to meet him?

A Yes, I did.

Q Tell the Judge when you first met him and what happened.

A It was January 12th, approximately 2:00 a.m. in the morning and I was headed south on routine patrol on Harbor City Boulevard and I fell in behind a '53 white Cadillac, occupied by two males, weaving across the center here and back to the right side of the road. At the time both subjects looked back and spotted me and attempted to evade me by crossing US 1 behind Winn-Dixie and they headed south on Babcock Street.

Q How far was this from where you first observed the Defendant?

A I'd say a good half a mile.

Q You indicated he weaved how many times or in what manner did he do that?

[175] A Approximately four times.

Q You say there was somebody driving?
A Gustafson.

Q Then what happened?
A At that time I pulled them over at Ulcht and Babcock Street and I asked for his driver's license. At that time he stated to me that he didn't have his driver's license with him, that he had left it at home. At that time he was placed under arrest for no driver's license and by the patrol car he was searched. At that time a package of cigarettes was taken off him, a Benson and Hedges box out of the left outside pocket of his coat. At that time I opened it and it appeared there were marihuana cigarettes in the box. I had been shown this in training at the police department and these appeared to be marihuana to me. At that time I advised the Defendant that he could remain silent; he didn't have to say anything; that anything he said could and would be used against him in a court of law; that he was entitled to an attorney if he so desired —

Q Well, other than those statements by you, did you ask this Defendant anything? Did you interrogate him in any manner?
A No, sir.

Q What did you do with him?
A At that time I put him in the patrol car and he [176] was taken to the Police Department and turned over to Lieutenant Mitchell.

Q Did you ever give him a citation?
A Yes.

Q I just have a copy of the citation he was given.

MR. RUSS: May I see it?

THE COURT: Do you wish to produce it in evidence for the purpose of this hearing alone?

MR. CIENER: Yes, if he has no objection ti it.

MR. RUSS: I have no objection for the purpose of this hearing.

THE COURT: There being no objection I will mark these documents as Exhibit 1 for the limited purpose of this hearing, State's Exhibit 1 in the motion to suppress hearing.

Q [By Mr. Ciener] Let me show you this, Officer Smith. Do you recognize that?
A Yes, sir.

Q As what?
A Citation written by myself for no driver's license.

Q Written to the Defendant?
A Yes, sir.

Q And after he was placed in the patrol car he was taken where?
A To the Police Department, Detective Division:

[177] Q Was anyone there?
A Lieutenant Mitchell.

Q Now, where did the events you have testified to occur, physically occur?

A Occurred —

Q What city?

A Eau Gallie.

Q Florida?

A Yes.

Q Brevard County?

A Yes, sir.

MR. CIENER: Nothing further.

CROSS-EXAMINATION

Q [By Mr. Russ] Mr. Smith, what position did you have with the Police Department on this particular night in question?

A Lieutenant in Charge.

Q Did you wear a uniform?

A Yes, sir.

Q Did you have a marked patrol car?

A No, sir.

Q An unmarked car?

A Yes, sir.

Q Were you carrying a sidearm?

A Yes, sir.

[178] Q Were you wearing a badge?
A Yes, sir.

Q Were you wearing some sort of cap with an emblem on it?
A Yes, sir.

Q You were just out cruising around that night?
A Yes, sir.

* * *

Q And there was lots of traffic that night?
A No, sir, I believe traffic was slow that night.

[179] Q In the City of Eau Gallie?
A Yes, sir.

Q Is there a parking lane along the right side of the road there?
A Yes.

Q Were you in your car parked along the road?
A No, sir.

Q In fact, aren't there three lanes, one parking lane and two driving lanes?
A Yes, sir.

Q Now, was it the line dividing the two driving lanes that you observed the Cadillac weaving across?
A Yes, sir.

Q Three or four times?
A Yes, sir.

Q Before or after the occupants in the Cadillac turned around and saw you?

A I would say it was before.

Q Did you observe any further weaving after they observed you?

A No, sir.

Q You first observed the car approximately half a mile from the city limits?

A Yes, sir.

Q Did you make any effort to stop the car after it [180] weaved three or four times?

A No, sir, I didn't have a chance to.

Q At the time did you pull alongside the car?

A No, sir.

Q Did you observe this car as a danger to property on the highway during the course of these three or four weaves?

A No, sir.

Q Did you observe it to be a danger to any person during the course of these three our four weaves?

A No, sir.

Q Was it violating the speed laws?

A No, sir.

Q What was the speed limit there?

A Thirty-five.

Q How fast was the car going would you estimate?
A Between twenty and twenty-five.

Q The car was kind of raggedy looking?
A Yes, sir.

Q It was a 1953 model?
A Yes, sir.

Q What caused you to be suspicious about it, the persons in the car?
A No, sir.

Q When the two occupants turned around were you able to identify either of them?
[181] A At that time, no, sir.

Q You could see they were males?
A Yes, sir.

Q White males?
A Yes, sir.

Q Young white males you could see?
A Yes, sir.

Q Did they appear to be kind of hippies?
A No, sir, at that time I couldn't see them too plain.

Q Were you suspicious about the fact that here were two young white males out at 2:00 in the morning?
A No, sir.

Q Let me ask you this. They were going south on US 1 and after turning around and seeing you then you said they turned off US 1?

A Yes, sir.

Q And they drove in the shopping center?

A Behind the shopping center.

Q What road was back there?

A There was a driveway around the building.

Q Did it violate traffic laws to go around the bilding?

A No, sir.

Q Did they come out on Babcock Street?

[182] A Yes, sir.

Q Heading in the general direction of Melbourne?

A Yes, sir.

Q And then this was when you pulled them over?

A Yes, sir.

Q And had any laws, any traffic laws, been violated up until that point?

A Only weaving.

Q Other than that?

A No, sir.

Q Did you pull them over because of the weaving?

A Yes, sir.

Q And it was your intention to arrest the driver for some driving violation?

A No, sir, it was my intention to find out why he had been driving that way, if he had been drinking or something.

Q I see. When Mr. Gustafson gout out of the car did you detect an odor of alcohol about his person?

A No, sir.

Q Was there anything in his mannerisms that suggested he was intoxicated?

A He appeared to me to be intoxicated by his actions and the bleeriness of his eyes.

Q You detected no odor of alcohol?

A No, sir.

[183] Q There was light there, I assume?

A Yes, sir.

Q From what?

A Street lights.

Q And you had seen Mr. Gustafson before?

A Before that time, no, sir.

Q Where were you at this point?

A Standing right up close to him, talking to him.

Q Did you observe them stumble at all?

A No, sir.

Q Did you observe Mr. Gustafson weave?
A No, sir.

Q Did he have a slurred manner about his speech?
A No, sir, he didn't.

Q You asked him for his driver's license?
A Yes, sir.

Q And he told you he did not have in his possession, is that true?
A Yes, sir.

Q He, in fact, did tell you he had a valid driver's license but it was not with him?
A Right.

Q Did you arrest him for driving while under the influence?
A No, sir.

[184] Q Did you arrest him for weaving on the highway
A No, sir.

Q Because he didn't have a driver's license in his possession?
A Yes, sir.

Q He told you he had a driver's license but not in his possession?
A Yes, sir.

Q A charge of no driver's license was made by you?
A Yes, sir.

Q This case was then dismissed, nol-prossed, in the Eau Gallie City Court?
A Yes, sir.

Q Because a valid driver's license was produced, was it not?
A Yes, sir.

Q You issue a number of traffic citations, do you not?
A Yes, sir, quite a few.

Q How many in a week's time?
A Eight or ten a week.

Q And you issue a number of them for not having a valid driver's license in their possession?
A It is general practice to stop a man and if he hasn't got a valid driver's licence I give him a citation.

[185] Q Do you take them down to the Police Station?
A Yes, sir.

Q In every instance?
A No, not in every instance.

Q How often out of, say ten cases?
A Maybe three or four.

Q Three or four out of ten?
A Yes, sir.

Q Do you require them to post bail?
A Some of the, yes, sir.

Q Did you set the bail in this case here?
A Yes, sir.

Q In the amount of $50?
A Yes, sir.

Q Now, when you talked to Mr. Gustafson out there on Babcock Street did he tell you he was a student?
A Yes, sir.

Q He went to the Florida Institute of Technology?
A Yes, sir.

Q And he had been in Brevard County for — this was his second academic year?
A Yes, sir.

Q He told you he lived in a campus dormitory?
A Yes, sir.

Q He told you that he owned a 1953 Cadillac automobile?
[186] A He did.

Q He also told you he didn't have the registration papers with him?
A Yes, sir.

Q He told you he had just bought the car and the papers hadn't cleared?
A No, sir.

Q Did you verify this?
A No, sir.

Q Then you thought that was the truth?
A Yes, sir.

Q Now, were you suspicious of these two young men merely because they drove around the back of the shopping center?
A No, sir, weaving down the road.

Q Three or four weaves?
A Yes, sir.

Q Well, in this weaving he went from the driving lane going south left about how much?
A About half of the lane, maybe.

Q Well, are you sure?
A No, I'm not sure.

Q You are not sure?
A No, sir.

Q Would it be reasonable to say it was simply a [187] matter of the left wheels going over the line?
A Yes.

Q He probably just straddled the line?
A Yes.

Q To your knowledge is this a criminal violation?
A Yes, sir, It could constitute careless driving.

Q There was no other traffice on the road except you and the Cadillac, is this true?
A Yes, sir.

Q Were you suspicious when the car drove off behind the shopping center?
A Was I suspicious?

Q Yes.
A No, sir, I planned to stop them.

Q You planned to stop them?
A Yes, sir.

Q Because of the weaving?
A Yes, sir.

Q Well, tell the Judge — you stopped them but you didn't charge him with any kind of traffic violation, did you?
A No, sir, I did not.

Q You arrested him — you said, "You're under arrest because you don't have a driver's license?
A Yes, sir.

Q Then you said, "Let me search you," or some words [188] to that effect?
A Yes — no, sir, I didn't say, "Let me search you." I always search them before I put them in the patrol car.

Q Sort of patting down on the sides?
A Yes, sir.

Q And even going into the pockets?
A Yes, sir.

Q Was he standing up against the car, with his arms up against the car?
A Yes, sir.

Q You took everything out of the pockets?
A Not everything, no, sir.

Q Did you take his wallet?
A No, sir.

Q You did take his cigarette box?
A Yes, sir, I did.

Q Handkerchief?
A No, sir.

Q Comb?
A No, sir.

Q What else did you take besides the package of cigarettes out of his pocket out there at the scene when you were going through the search?
A A little long chain, about this long.

Q How about the change in his pockets?
[189] A No, sir.

Q Did you take the keys out of his pockets?
A The keys were in the car.

Q Did you take his glasses?
A No, sir.

Q Do you remember taking anything out of his pockets except the cigarette package and a little chain?
A Only the chain.

Q If I didn't have a driver's license and you stopped me and decided to give me a citation doesn't this ordinarily mean that I would come back to Court on a certain day?
A Yes, sir.

Q Then you are really released on your word?
A If you live in the City Limits of Eau Gallie.

Q And if I don't?
A In some instances if they live outside.

Q Well, you learned from Mr. Gustafson that he lived in the City of Melbourne?
A Yes, sir.

Q Melbourne and Eau Gallie have common city limits?
A Yes, sir.

Q But back to my case. If you give me a citation and you decide not to require me to post bail and you released me just on my own good word you wouldn't search me, would you?
[190] A If you were released, no, sir.

Q I would just go on my way with a piece of paper in my hand?

A Yes, sir.

Q When you actually make an arrest you then search the individual prior to putting him into your car, is that right?

A Yes, sir.

Q Did you stop any other cars that night?

A Sir, I don't recall if I stopped any more.

Q How long had you been out cruising around?

A Since 11:00.

Q This is about two and a half hours?

A Yes, sir.

Q And you were cruising all over the City of Eau Gallie?

A Yes, sir.

Q And there were no police markings on your car whatsoever?

A Nothing but the antenna.

Q Did you ever turn on your flashing light?

A Yes, sir, I did.

Q Where was that?

A Babcock Street.

Q Did he come to a stop when you turned the light on

[191] A He stopped the car at the entrance to J. M. Fields parking lot.

Q There was an immediate response to the flashing light?
A Yes, sir.

MR. RUSS: No other questions.

MR. CIENER: Nothing further.

Q [By the Court] Officer, I don't believe either of the attorneys asked you a question I want to ask you. You did say that it was the weaving you had on your mind when you stopped them?
A Yes, sir.

Q That you felt they had broken the law?
A Yes, sir.

Q A City Ordinance of Eau Gallie?
A Yes, sir.

Q What was that?
A Careless driving by weaving.

Q Why didn't you arrest him on that then?
A At that point I didn't feel he had weaved enough to arrest him for careless driving.

THE COURT: Any further questions?

MR. RUSS: No, sir. Mr. Ciener?

MR. CIENER: Nothing.

* * *

Supreme Court of the United States

No. 71-1669 ~~, October Term, 19~~

James R. Gustafson,

Petitioner,

v.

Florida

Order allowing certiorari. Filed March 19, 19 73

The petition herein for a writ of certiorari to the Supreme Court of the State of Florida is granted, and case set for argument with No. 72-936.

71-1669

Supreme Court, U. S.
FILED
JUN 22 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

JAMES E. GUSTAFSON,
Petitioner,

versus

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No.

JAMES E. GUSTAFSON,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, James E. Gustafson, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered on January 26, 1972, quashing an opinion rendered by the District Court of Appeal of Florida, Fourth District, on February 8, 1971. The opinion of the Fourth District Court of Appeal reversed a trial court order of probation and remanded the petitioner's case with directions that he be discharged from further prosecution.

OPINIONS BELOW

The opinion of the Supreme Court of Florida which the petitioner prays that this Court review is reported at 258 So.2d 1, and is set out in the Appendix to this petition. The decision of the District Court of Appeal of Florida, Fourth District, which was quashed by the

Florida Supreme Court's opinion is reported at 243 So. 2d 625. This opinion is also set out in the Appendix being filed with this petition.

JURISDICTION

The jurisdiction of this court is invoked under Section 1257(3), Title 28, United States Code.

QUESTION PRESENTED

Whether a police officer's stopping of a motorist on grounds of mere suspicion or curiosity authorizes an extensive search of the motorist's person and clothing after the officer, in response to routine questioning, is advised by the motorist that he does not have his valid vehicle operator's license with him.

CONSTITUTIONAL PROVISION INVOLVED

This case presents questions concerning the construction and interpretation of the Fourth Amendment to the United States Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated. . . . "

STATEMENT OF THE CASE

The petitioner and a companion were returning to their college dormitory in the early morning hours of Sunday, January 12, 1969, after having taken their evening dates home. While the petitioner was driving his automobile through the city of Eau Gallie, Florida,

a municipal police officer on routine patrol observed the vehicle to weave slightly with the left wheels crossing into another traffic lane. The officer stopped the vehicle to "check it out" with no evidence of the actual commission of any traffic offense and with no intention of making an arrest.

Upon stopping the vehicle, the officer asked the petitioner for his driver's license. The petitioner informed the officer that he was a student and had left his driver's license in his dormitory room in the neighboring city of Melbourne, Florida. The petitioner was then arrested for failure to have his vehicle operator's license in possession.[1] The officer then undertook an extensive search of the petitioner's person and clothing and determined to place him in the patrol car to be taken to the police station. The petitioner's passenger, who had not been arrested for any offense, was also thoroughly searched and subsequently taken to the police station.

During the police officer's search, a cigarette package was removed from the petitioner's coat pocket and the police proceeded to examine its contents. This examination revealed the existence of several homemade cigarettes.

The petitioner was ultimately charged with the possession of three marijuana cigarettes and stood trial on this charge. Through timely motions to suppress, the petitioner challenged the legality of his arrest and the search and seizure of the tangible evidence which

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[1]Fla. Stat. §322.15 (1969)

formed the basis of the prosecution. His motions and objections were denied and he was found guilty of the possession charge. The trial judge entered an order of probation w.thholding adjudication of guilt and an appeal was taken.

The petitioner sought review of the trial court rulings in the District Court of Appeals of Florida, Fourth District. The Fourth District Court of Appeal held the search to be unreasonable under the circumstances since it was not related to the petitioner's arrest for a minor traffic charge and since it proceeded far beyond a mere custodial search limited to weapons or instrumentalities for escape. The order of probation was reversed and the case was remanded with directions to the trial court to discharge the petitioner from further prosecution on the charge. *Gustafson* v. *State*, 243 So.2d 615 (4th D.C.A. Fla.1971).

The State of Florida petitioned the Supreme Court of Florida for a writ of certiorari. The Florida Supreme Court took jurisdiction of the cause and subsequently quashed the opinion of the District Court of Appeal. *State* v. *Gustafson*, 258 So.2d 1 (Fla. 1972).

The decision of the Florida Supreme Court labeled the District Court's requirement that such searches be either related to the charge for which the arrest is made or limited to a search for weapons or instrumentalities for escape, to be an outright "reversal" or rejection of former Florida decisions, containing "reversionary views" contrary to an entire body of established law and a "radical departure" from established reasonable standards. The petitioner had con-

tended that this Court's decisions in *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and *Sibron* v. *New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) were clearly applicable to the search and seizure question in this case. The Florida Supreme Court, however, failed to even cite *Terry* or *Sibron* in the course of its opinion.

REASONS FOR GRANTING THE WRIT

The Fourth Amendment And This Court's Decisions In *TERRY V. OHIO*, 392 U. S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) And *SIBRON V. NEW YORK*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1968) Prohibit The Conducting Of An Extensive Search Of A Motorist's Person And Clothing By A Police Officer Who Has Stopped The Motorist On Grounds Of Mere Suspicion Or Curiosity And Who Has Learned In Response To Routine Questioning That The Motorist Has Violated A Minor Traffic Regulation In Not Having His Motor Vehicle Operator's License In Possession While Driving.

The Fourth Amendment considerations and principles announced by this Court in *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) have, quite naturally, come into play in cases involving momentary questioning or detention of automobile drivers and passengers by law enforcement officials. See *United States* v. *Davis*, 441 F.2d 28 (9 Cir.1971); *Tinney* v. *Wilson*, 408 F.2d 912 (9 Cir.1969); *United States* v. *Gonzalez*, 319 F.Supp. 563 (D.Conn.1970) and *United States* v. *Robinson*, 447 F.2d 1215 (D.C.Cir.1971) reargued en banc on June 1, 1972.

In and of itself, an arrest for the usual minor traffic violation cannot support a subsequent search that is wholly unrelated in scope or purpose to the nature of the arrest. Ordinarily, there are no fruits or instrumentalities of these offenses. In such cases the "incidental to arrest" exception to the command of the Constitution is not present and, therefore, law enforcement searches of this nature are per se general and unreasonable. See *Amador-Gonzalez* v. *United States*, 391 F. 2d 308 (5 Cir.1969) and Annotation, Lawfulness of Search of Motor Vehicles following Arrest for Traffic Violations, 10 A.L.R.3d 314.

The question of whether any search at all may be conducted by a law enforcement official following a minor traffic arrest is dividing courts throughout the country. See *People* v. *Marsh*, 20 N.Y.2d 98, 281 N.Y.S. 2d 789 (N.Y.Ct. App. 1967); *State* v. *Curtis*, 190 N.W.2d 631 (Minn.1971); *People* v. *Weitzer*, 269 Cal.App.2d 274, 75 Cal.Rptr. 318 (Cal. 1st D.C.A.1969).[2]

Nevertheless, assuming that a limited search may be authorized, it is certainly clear that the scope and extent of the intrusion into the motorist's person and effects can be no broader than a search following the principles enunciated by this court in *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

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[2]During the course of the printing of this petition, counsel received word that the California Supreme Court has now rejected a previous appellate decision in *People* v. *Graves*, 263 Cal. App. 2d 719 70 Cal. Rptr. 509 (1968). California now requires that a pat-down search for weapons as a incident to a minor traffic arrest must be predicated upon specific facts or circumstances giving the officer reasonable grounds to believe that a weapon is secreted on the motorist's person. See *People* v. *Simon*, 11 Crl. 2231, _____, _____ Cal. App. _____, _____ (Cal. May, 1972).

In the instant case, the police officer had no cause to believe that he was dealing with an armed or dangerous criminal and there was certainly no indication that his safety and well-being required an extensive exploratory search. The petitioner and his companion had made no threatening gestures and they were perfectly cooperative with the officer in providing responses to his questions and requests. These facts by themselves negate the existence of grounds for believing that he is dealing with an armed or dangerous individual. See *United States* v. *Hostetter*, 295 F.Supp. 1312 (D.Del.1969).

The decision of the Florida Supreme Court in the instant case would authorize full-scale exploratory searches of motorists where a police officer admittedly has no probable cause for any arrest upon the formulation in the officer's mind of what that court calls "a reasonable suspicion" that the motorist is driving under the influence of a drug or beverage.[3] In light of the Florida Supreme Court's decision in this case, the Fourth Amendment protections available to

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[3]Although the Florida Supreme Court determined that this suspicion was present in the petitioner's case, it must be pointed out that the transcript of record in the case was never considered by that Court since it had never even been forwarded up from the District Court of Appeal. Only the legal arguments advanced in petitions and briefs filed by counsel for the State and petitioner and the opinion filed by the District Court of Appeal were presented to the Florida Supreme Court. The State had never contended that the police officer believed the petitioner to be intoxicated and, therefore, was searching for alcoholic beverages or drugs. The depositions and transcripts of testimony in the case are totally devoid of evidence to the effect that the petitioner exhibited any indications or manifestations of being under the influence of any drug or beverage.

motorists traveling on Florida's highways today have been diminished to such an extent that police intrusions into their persons and privacy need now only be governed by the "suspicion" standards applicable to border searches.

The Florida Supreme Court's decision in this case authorizes police conduct that can in no way be considered as being reasonable and allowable in the face of the Fourth Amendment's proscriptions. Consequently, this Court should grant certiorari in order to announce that the Fourth Amendment to the United States Constitution prohibits extensive exploratory searches which go beyond a mere pat-down for weapons or instrumentalities of escape in minor traffic offense cases when the officer has no reason to believe he is dealing with an armed or dangerous individual and where he has no grounds for believing that his safety or that of others is in danger.

CONCLUSION

In view of the vital importance of the question presented and the considerations set forth above, we respectfully submit that this petition for writ of certiorari be granted.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of June, 1972, copies of this Petition for Writ of Certiorari were mailed, to the Honorable Robert L. Shevin, Attorney General of the State of Florida at Tallahassee, Florida, and to the Honorable Andrew Freidrich, Assistant Attorney General, 225 Pan-American Building, West Palm Beach, Florida 33401. I further certify that all parties required to be served have been served.

MICHAEL F. CYCMANICK

CERTIFICATE OF ATTORNEY

I, MICHAEL F. CYCMANICK, hereby certify that I am a member of the Bar of the United States Supreme Court in good standing and was admitted to practice by the Court on February 22, 1972.

MICHAEL F. CYCMANICK
Attorney

APPENDIX

State v. Gustafson, 258 So. 2d 1 (Fla. 1972)

STATE of Florida, Petitioner,

v.

James E. GUSTAFSON, Respondent.

No. 40808.

Supreme Court of Florida.

Jan. 28, 1972.

The Court of Record for Brevard unty, Joe A. Cowart, Jr., J., entered or- r imposing probation without adjudica- n of guilt on charge of unlawful pos- sion of marijuana, and defendant ap- led. The District Court of Appeal, on, C. J., 243 So.2d 615, reversed and anded, and State brought certiorari. e Supreme Court, Dekle, J., held that sonable suspicion that automobile driver s intoxicated not only justified stopping automobile but also justified searching intoxicants or drugs, and that a search ich reasonably ensues after a legal ar- t is proper, without regard to whether re is nexus between offense in question object sought.

Opinion of District Court of Appeal shed in part.

Ervin and McCain, JJ., dissented.

vays and Narcotics ⇐183

violating Liquors ⇐247

Reasonable suspicion that automobile r was intoxicated not only justified stopping the automobile but also justified searching for intoxicants or drugs. U.S. C.A.Const. Amend. 4; F.S.A.Const. art. 1, § 9; F.S.A. § 317.201.

2. Automobiles ⇐349

In routine stopping of a motorist by an officer, as for failure to yield right-of-way, in which traffic citation may be issued, reason for general search does not arise, and none would be authorized.

3. Arrest ⇐71.1(2)

Search which reasonably ensues after a legal arrest is proper, without regard to whether there is nexus between offense in question and object sought. U.S.C.A. Const. Amend. 4; F.S.A.Const. art. 1, § 9; F.S.A. § 901.21.

Robert L. Shevin, Atty. Gen., and Charles W. Musgrove, Asst. Atty. Gen., for petitioner.

Michael F. Cycmanick of the Law Offices of James M. Russ, Orlando, for respondent.

DEKLE, Justice.

Petition for certiorari is before us in this cause asserting conflict with Farmer v. State, 208 So.2d 266 (3rd DCA Fla. 1968), and Smith v. State, 155 So.2d 826 (2nd DCA Fla.1963), regarding the question of proper search and seizure. We find conflict which vests jurisdiction under

Fla.Const. art. V, § 4, F.S.A., to review the Fourth District Court opinion at 243 So.2d 615 (1971).

The catalyst for the extensive district opinion is a traffic incident occurring about 1:30 a. m. in the early Sunday morning hours in the town of Eau Gallie on Florida's lower east coast. An automobile driven by appellant and bearing out-of-state license plates was observed by a city police officer to be weaving across the line into another traffic lane. The officer stopped the vehicle "to find out why he had been driving that way, if he had been drinking or something." Upon the officer routinely asking for his driver's license, the appellant informed him that he had left it in his dormitory room at the adjoining town of Melbourne. He was thereupon arrested for failing to have a driver's license pursuant to statute.[1]

At this point when appellant was under arrest, the officer searched him and in a cigarette package taken from appellant's pocket he observed several homemade cigarettes. They turned out to be marijuana. Appellant was then charged with possession of marijuana under the statute.[2]

At a non-jury trial on the charge of unlawful possession of marijuana, the trial judge withheld adjudication of guilt and placed appellant on probation. The Fourth District Court reversed and held this to be an improper search and seizure and so not allowable in evidence, thus precluding any conviction. The court cited the Fourth Amendment to the United States Constitution and Section 12 of the Florida Declaration of Rights securing the people against unreasonable searches and seizures.

The district court's opinion is commendable in its research and treatment of the questions involved and while we uphold the opinion in its basic findings on the questions (1) that the initial stop and detention are reasonable under the circumstances and thus proper under the Fourth Amendment; (2) that the officer had authority to take appellant into custody for failure to have a driver's license in his possession and to arrest him for it; (3) that the officer had authority to search appellant's person instant to such arrest for a minor traffic violation; we reverse on the court's principal holding that the evidence should have been suppressed as the product of an illegal search and seizure in these circumstances.

[1] A reasonable suspicion (which was present here) that the driver was intoxicated not only justified stopping the vehicle, but also justified searching for intoxicants *or drugs*, inasmuch as our statute makes the influence of either an offense.[3] In today's proliferation of illegal drug use which affects the faculties, checking only for liquors is no longer adequate. The new and devastating use of various drugs in myriad forms (unhappily by drivers in dangerous instrumentalities) imposes the further duty upon the alert police officer to examine as well for such drugs in their various forms. Statistics are now reporting that 1 in 5 fatal traffic accidents involve the use of intoxicants or drugs. Finding the marijuana cigarettes in the natural place of a cigarette package is no different than finding liquor in a liquor bottle. It is no less a proper search and seizure.

The district court opinion criticizes the appellate decisions of this state, including those of this Court and of other district courts initially set forth above for conflict, as being in error in asserting the test for reasonableness for search as being what it describes as "merely a determination of whether the search was incident to a law-

1. Fla.Stat. § 322.15, F.S.A.

2. Fla.Stat. § 398.01 et seq., F.S.A.

3. Fla.Stat. § 317.201, F.S.A. Includes: ". . . under the influence of alcoholic beverages, narcotic drugs, barbiturates or control nervous system stimulants. . . ."

ful arrest," citing this court's opinions in Italiano v. State, 141 Fla. 249, 193 So. 48 (1940), and Self v. State, 98 So.2d 333 (Fla.1957). Our opinions are then described as "applying a categorical test of whether a lawful arrest preceded the search with little or no indication that other relevant circumstances were taken into consideration."

The district court then states:

"We will not compound the error nor blindly follow the categorical rule that a search incident to *any* arrest for the commission of *any* crime is lawful under the fourth amendment of the United States Constitution and Florida's Declaration of Rights."

The district opinion is an outright "reversal" (rejection) of our former decisions on the test for reasonable search and seizure. We expressly reverse the district opinion in such respect.

It has been the holding of the authorities through the years that once a proper arrest is made and the defendant is in custody that a reasonable search may then proceed and if evidence be then discovered reflecting that a crime has been committed or is being committed, the evidence is proper and admissible. This has included contraband upon search of a vehicle on probable cause (Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925)[4]; search of the person and immediate surroundings as an incident to arrest (Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)); and the "plain sight" exception of property which is apparent to the officer after reasonable cause for stopping the defendant (Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927); State v. Ashby, 245 So.2d 225 (Fla.1971)).

In Smith v. State, *supra* (relied on for conflict), lottery paraphernalia was found in the defendant's pocket during an arrest for operating a vehicle without a driver's license (the same arrest as here and the evidence was in plain sight upon "pat down" incident to taking into custody). It was also held to be a reasonable search, properly incident to the arrest, and the use of evidence discovered was held to be proper in Farmer v. State, *supra*, where marijuana was found in a match box after an arrest for public drunkenness.[5] Fla.Stat. § 901.21, F.S.A. (1970) also supports such search.

[2] In the routine stopping of a motorist by an officer, as for a "failure to yield right of way", etc., where a traffic citation may be issued, there does not arise any reason for a general search and none would be authorized. This is consistent with the authorities against unreasonable search where there is no occasion for it. These include the line of cases represented by Graham v. State, 60 So.2d 186 (Fla. 1952), holding some incidental searches to be unreasonable and therefore improper, where a person is stopped in a vehicle "only as a pretext for a warrantless search." These are indeed exploratory and not truly incident to arrest since the search is the primary purpose of the arrest. Riddlehoover v. State, 198 So.2d 651 (3d DCA Fla.1967); Chapman v. State, 158 So.2d 578 (3d DCA Fla.1963).

The district court turns to Illinois for a different view than that which has been established in Florida. The opinion quotes from People v. Watkins, 19 Ill.2d 11, 166

4. Fla.Stat. § 933.19, F.S.A. literally adopts the opinion of the Court in Carroll *by* express reference, the only such time to our knowledge that this has been done.

5. See also, Fletcher v. State, 65 So.2d 845 (Fla.1953); Gibson v. State, 180 So.2d 685 (3d DCA Fla.1965); Chippas v. State, 180 So.2d 355 (3d DCA Fla. 1965); Gray v. State, 177 So.2d 868 (3d DCA Fla.1965); Lyons v. Town of Lake Park, 153 So.2d 21 (2d DCA Fla. 1963); Cameron v. State, 112 So.2d 864 (1st DCA Fla.1960); Boseman v. State, 102 So.2d 648 (2d DCA Fla.1958).

N.E.2d 433 (1960), and some of the federal courts, citing the 9th Circuit in Jack v. United States, 387 F.2d 471 (1967). There the narrow test is applied that in any incidental search upon arrest "it must . . . relate[s] to *the* crime for which the *arrest* is made . . . and not to some other charge . . . ." (emphasis ours)

The district court opinion poses the query: "May the search be for evidence of any crime, or is it limited to fruits of the crime *for which the person was arrested?*" (emphasis ours) The district's answer would restrict the search to that relating to the *particular* crime for which the actual arrest was made. It would even limit the search after arrest "to a search for *weapons*, which normally entails only 'patting down' the suspect." Further on, the opinion would limit custodial search "to weapons and instrumentalities for escape." This is contrary not only to all Florida authorities as cited above but actually would be in derogation of the statute, section 901.21.

[3] We reject these reversionary views as contrary to the entire body of established law which has been built up in this area and which permits proper incidental search that *reasonably* ensues after a legal arrest, in accordance with the foregoing authorities which we have set forth and in accordance with our Fla.Stat. § 902.21, F.S.A. This is no time for a retreat in the law when modern methods are demanded by accelerating criminal activity.

Neither do we subscribe to the district opinion's conclusions that generally in traffic arrest situations "there are no fruits or instrumentalities of the crimes"; nor with the assertion that "most searches [and seizures] following an arrest for a traffic violation will undoubtedly be improper" and so prohibited by the Fourth Amendment.

The district court describes its own position as being "This more restrictive interpretation of the proper scope of a search incident to arrest" and introduces the new and narrow test that:

> "There must be a nexus between the offense and the object sought for a search conducted in connection with an arrest to be truly *incident* to it."

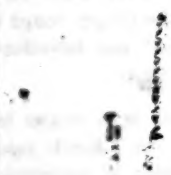
We cannot condone this radical departure from established, reasonable standards. We adhere to the former decisions of this state on the subject earlier recited.

The district court's opinion is accordingly quashed except as expressed herein.

It is so ordered.

ROBERTS, C. J., and CARLTON, ADKINS and BOYD, JJ., concur.

ERVIN and McCAIN, JJ., dissent.



possession of marijuana. The District Court of Appeal, Cross, C. J., held that although officer had reasonable grounds for stopping defendant's automobile to determine if defendant was driving while intoxicated and to arrest defendant for failure to have driver's license in his possession, there could be no valid search as an incident to the arrest, and although officer had right to conduct search of defendant's person for officer's protection and to prevent escape, officer exceeded scope of custodial search in removing cigarette package from defendant's coat pocket and inspecting the contents.

Reversed and remanded with directions.

Reed, J., concurred in conclusion.

1. Arrest ⇐68

An "arrest" is the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime. U.S. C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Arrest ⇐68

Elements required in an arrest are a purpose or intention to effect an arrest under a real or pretended authority; an actual or constructive seizure or detention of the person to be arrested by person having present power to control the person arrested; a communication by the arresting officer to the person whose arrest is sought of intention or purpose then and there to effect an arrest; and an understanding by

James E. GUSTAFSON, Appellant,

v.

STATE of Florida, Appellee.

No. 69-714.

District Court of Appeal of Florida, Fourth District.

Feb. 8, 1971.

Appeal from order of the Court of Record for Brevard County, Joe A. Cowart, Jr., J., imposing probation without adjudication of guilt on charge of unlawful

arises out of the transaction or occurrence that is the subject matter of the opposing party's claim * * *.

8. RCP 1.170(j). None of the limitations and restrictions to this rule appear to be applicable to the instant action. For such limitations and restrictions, see Davis v. Fiato, 210 So.2d 10 (Fla.App. 1968).

7. Section 51.011(1) Pleadings— * * * If the answer incorporates a counterclaim, plaintiff shall include all defenses of law or fact in his answer to the counterclaim * * *.

7. RCP 1.170(a) Compulsory Counterclaims—A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it

the person whose arrest is sought that it is the intention of arresting officer then and there to arrest and detain him. U.S.C.A. Const. Amend. 4.

3. Arrest ⊂=68

Although in certain circumstances an arrest is effectuated when vehicle in which person to be arrested is riding is stopped, detention for purpose of questioning occupants pursuant to a routine investigation is not a technical "arrest" which brings into play all the requirements of probable cause. U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⊂=7(10, 12)

Stopping a vehicle to interrogate the occupants pursuant to a routine investigation comes under the Fourth Amendment protections against unreasonable searches and seizures, and the act of an officer in stopping an automobile and approaching it while armed and in uniform constitutes "seizure" of the person, no matter how brief the detention period. U.S.C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

5. Arrest ⊂=63(4)

Simple good faith on part of officer is not enough to justify arrest without warrant; an objective standard must be used to test the reasonableness of the detention. U.S.C.A.Const. Amend. 4.

6. Arrest ⊂=63(4)

A vehicle may be stopped and its occupants detained if the officers have reasonable grounds for their actions, but a bare suspicion will not constitute reasonable grounds for the detention; the suspicion, if it is to be the grounds for the detention, must be founded upon a reasonable belief that a crime is being or has been committed by the occupants of the vehicle. U.S.C.A.Const. Amend. 4.

7. Criminal Law ⊂=412.2(2)

Officer's demand that defendant, whose automobile was stopped to enable officer to determine if defendant was driving while intoxicated, produce driver's license did not constitute a "custodial interrogation," and defendant was not entitled to warnings prior to arrest for failure to have driver's license in his possession.

8. Automobiles ⊂=349

Officer who arrested defendant for operating motor vehicle without driver's license in his possession had authority to take defendant into custody where defendant was driving automobile with out-of-state license plates and officer may have had reasonable grounds to believe defendant would not have appeared pursuant to a citation. U.S.C.A.Const. Amend. 4.

9. Arrest ⊂=71.1(8)

There must be a nexus between the offense and the object sought for a search conducted in connection with an arrest to be truly incident to it. U.S.C.A.Const. Amend. 4.

10. Arrest ⊂=71.1(6)

Arresting officer not only has right and duty to search arrested person for fruits and instrumentalities of the offense and for evidence as incident to the arrest, but he also has right to protect himself and to prevent possible escape by searching for weapons. U.S.C.A.Const. Amend. 4.

11. Arrest ⊂=71.1(6)

Even if arresting officer has no reasonable cause to believe suspect is armed, when suspect is taken into custody the officer has a right to search for any hidden weapon which could be used to effect escape. U.S.C.A.Const. Amend. 4.

12. Arrest ⊂=71.1(6)

Officer's protective search of arrested suspect for weapons must be limited in scope to a search for weapons. U.S.C.A. Const. Amend. 4.

3. Automobiles C=349

Although officer had reasonable grounds for stopping defendant's automobile to determine if defendant was driving while intoxicated and to arrest defendant for failure to have driver's license in his possession, there could be no valid search as an incident to the arrest, and although officer had right to conduct search of defendant's person for officer's protection and to prevent escape, officer exceeded scope of custodial search in removing cigarette package from defendant's coat pocket and inspecting the contents. U.S.C.A. Const. Amend. 4; F.S.A.Const. art. 1, § 9; F.S.A. § 901.21.

4. Automobiles C=349

Search of defendant after arrest for failure to have driver's license in his possession which went beyond scope of search for weapons was not lawful on theory that defendant would have been thoroughly searched at the police station in view of probability that defendant would have been released. U.S.C.A.Const. Amend. 4.

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CROSS, Chief Judge.

Appellant-defendant, James E. Gustafson, appeals an order of probation withholding adjudication of guilt in a non-jury trial on a charge of unlawful possession of marijuana. We reverse.

At approximately 1:30 a.m. on Sunday morning, January 12, 1969, appellant was driving an automobile in the City of Eau Gallie. A police officer of the city on routine patrol was following and observed appellant's vehicle weave slightly, the left wheels crossing into another traffic lane. The officer stopped the vehicle only "to find out why he had been driving that way, if he had been drinking or something," with no intention of making an arrest for reckless driving.

Upon stopping the vehicle, the officer asked for appellant's driver's license. Appellant informed the officer he was a student and had left his driver's license in the dormitory room at Melbourne. Appellant was then arrested for failure to have a driver's license in his possession, searched, placed in the patrol car and taken to the police station. A companion riding in the vehicle as a passenger was also searched.

During the search the officers took from appellant's coat pocket a cigarette package and proceeded to examine its contents. The examination revealed the existence of several home-made cigarettes. The officer then asked appellant if they were marijuana cigarettes, and the appellant ultimately replied that they were. Upon arrival at the police station, the patrolman delivered the cigarette package and its contents to one of the city's detective lieutenants, who examined the cigarettes and made a preliminary determination that the cigarettes contained marijuana. Appellant was then charged with possession of marijuana. He was subsequently advised of his constitutional rights.

By motions prior to trial and at the non-jury trial appellant by objections challenged the constitutionality of the arrest, the search, seizure, admissibility of the tangible evidence and statements, and the statute upon which the information was based. Needless to say, the motions and objections were denied. The trial court determined appellant was guilty, withheld adjudication of guilt and placed appellant on probation. Hence this appeal.

On appeal appellant raises six points: (1) that the initial stop and detention was unreasonable and thus unlawful under the fourth amendment; (2) that the officer failed to give Miranda warnings upon stopping the automobile, thus rendering all

statements and evidence obtained thereafter inadmissible; (3) that the officer had no authority to take appellant into custody for failure to have a driver's license in his possession; (4) that the officer had no authority to conduct a search of appellant's person incident to an arrest for a minor traffic violation; (5) that the evidence was insufficient to establish that the contents of the cigarettes were narcotic; and, (6) that the applicable statute cannot constitutionally proscribe the possession of botanical substances that are not narcotic.

In support of the first contention, appellant asserts that the initial "seizure" of appellant's person was without probable cause, and that any evidence discovered incident to the "illegal arrest" should have been suppressed.

The fourth amendment to the United States Constitution and section 12 of the Florida Declaration of Rights, F.S.A., secure the people against unreasonable searches and seizures and provide certain requirements for the issuance of a warrant. Traditionally, these provisions have been applied to arrests and searches and seizures, with the test of probable cause being applied where no warrant is issued.

[1, 2] In Florida an arrest has been defined as the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime. Essentially, four elements are required in an arrest: (1) a purpose or intention to effect an arrest under a real or pretended authority; (2) an actual or constructive seizure or detention of the person to be arrested by a person having present power to control the person arrested; (3) a communication by the arresting officer to the person whose arrest is sought, of an intention or purpose then and there to effect an arrest; and (4) an understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to arrest and detain him. Melton v. State, Fla. 1954, 75 So.2d 291.

[3] In certain circumstances an arrest is effectuated when the vehicle in which the person to be arrested is riding is stopped, since the officer has effectively interrupted and restricted his liberty of movement. Henry v. United States, 1959, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134. This rule has been applied where the arresting officer had probable cause to believe the driver of the vehicle was carrying moonshine, United States v. Davis, W.D. Pa.1967, 265 F.Supp. 358, and where an illegal U-turn was made in the officer's presence, United States v. Washington, D. C.1965, 249 F.Supp. 40.

Clearly, however, there are instances where a vehicle is stopped on a highway by an officer of the law where he does not have probable cause to make an arrest, and in fact, he does not intend to make an arrest unless he acquires additional information to warrant an arrest. Such a detention for the purpose of questioning the occupants pursuant to a routine investigation is not a technical "arrest" which brings into play all the requirements of probable cause. Rios v. United States, 1960, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (routine questioning when a car stopped at an intersection in a neighborhood which had a reputation for narcotics activity); Nicholson v. United States, 5 Cir. 1966, 355 F.2d 80; Rodgers v. United States, 8 Cir. 1966, 362 F.2d 358 (check for a stolen car). Lipton v. United States, 9 Cir. 1965, 348 F.2d 591 (momentary detention to check operator's license); Busby v. United States, 9 Cir.1961, 296 F.2d 328 (routine investigation pursuant to reliable information).

Florida courts have recognized use of detentions which fall short of technical arrests. Chance v. State, Fla.App.1967, 202 So.2d 825 (investigation of a liquor store robbery); Lowe v. State, Fla.App.1966, 191 So.2d 303 (investigation of robbery suspects). A license check evidently falls into this category. City of Miami v. Aronovitz, Fla.1959, 114 So.2d 784.

[4] Although a distinction is made from a formal arrest, stopping a vehicle to interrogate the occupants pursuant to a routine investigation still falls under fourth amendment protections against unreasonable searches and seizures. For this purpose, the act of an officer in stopping an automobile and approaching it while armed and in uniform constitutes a *seizure* of the person, no matter how brief the detention. Albeit for a short time, the liberty of the occupants of the car is restrained just as much as if the officer had made a formal arrest and then subsequently released the "arrested" individuals. A similar distinction was at issue in Terry v. Ohio, 1968, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889:

"It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."

In the opinion for the majority, Chief Justice Warren warned against drawing distinctions between types of police detentions which would "isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen." The fourth amendment was held to come into play as a limitation upon police conduct even if the officers stop short of a technical arrest.

Query: In light of the fourth amendment, may an officer stop and detain the occupants of an automobile for anything less than the probable cause required for arrests and searches?

[5] The constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention without cause and formal arrest without cause, but there is a difference between the "cause" required. Wilson v. Porter, 9 Cir. 1966, 361 F.2d 412. In Terry v. Ohio, supra, the court sought to balance the need to seize the person against the intrusion which it entails. The court held that in justifying the particular intrusion the officer must point to facts which together with rational inferences from them reasonably warrant the intrusion. Simple good faith on the part of the officer is not enough. An objective standard must be used to test the reasonableness of the detention:

"[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? • • • Anything less could invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." Terry v. Ohio, supra.

The test has also been stated as follows:

"But due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers would have had reasonable grounds for their actions. A *founded suspicion* [supplied] is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing." Wilson v. Porter, supra.

[6] We adhere to the rule that a vehicle may be stopped and its occupants detained if the officers have reasonable grounds for their actions. State v. Padilla, Fla.App.1970, 235 So.2d 309. But a bare suspicion will not constitute reasonable grounds for the detention. Kersey v. State, Fla.1952, 58 So.2d 155; Carter v. State, Fla.App.1967, 199 So.2d 324. The suspicion, if it is to be the grounds for the detention, must be founded upon a reasonable belief that a crime is being or has

been committed by the occupants of the vehicle. Other tests may apply if the detention is merely for questioning. See State v. Padilla, supra.

Turning to the case at bar, we ascertain from the record that the only basis for the initial detention of appellant was that the officer suspected that he was intoxicated. This suspicion was based on the fact that the left wheels of the automobile veered into the other traffic lane.

Whether weaving back and forth on the highway constitutes reckless driving has been discussed at length by the Florida Supreme Court. Brown v. State, Fla.1956, 91 So.2d 175; Collins v. State, Fla.1953, 65 So.2d 61. In the instant case, however, the officer admitted and the trial court determined that the officer lacked sufficient grounds for arresting appellant for reckless driving.

In the briefs both parties argue whether the officer had a right to stop appellant to check his driver's license, but our reading of the record indicates that the sole reason for stopping the automobile was to determine if appellant was driving while intoxicated. Our determination, then, is whether the officer had reasonable grounds to stop appellant's automobile on that basis.

Drunken drivers are a dangerous menace to highway traffic. Certainly, where a vehicle veers from side to side of the road and crosses the line which delineates its proper lane, where the vehicle is moving at a very slow rate of speed, and where this occurs in the early hours of the morning, we cannot say that an officer does not have reasonable grounds for believing the driver to be intoxicated and thus violating the law in the presence of the officer. There is no unreasonable seizure of the driver's person when he is stopped and momentarily detained while the officer investigates his suspicion. Thus, the appellant was lawfully detained, and the officer was authorized to ask appellant as driver of the vehicle to produce his driver's license.

[7] As to appellant's second contention, Miranda warnings were not necessary before the officer demanded that appellant produce his driver's license. This was not a custodial interrogation; Miranda does not require warnings prior to arrest. Jennings v. United States, 5 Cir. 1968, 391 F.2d 512.

Appellant's third contention is that the officer had no authority to take appellant into custody for failure to have a driver's license in possession.

[8] Section 186.51(1) of the Model Traffic Ordinance adopted by the City of Fau Gallie provides that a violator of a traffic ordinance may be kept in custody or released on bail where it appears doubtful that he will appear pursuant to a written citation. In the instant case, there is no reason why the officer should not have taken appellant to the police station for formal charging or to set bail. Appellant was driving an automobile with an out-of-state license plate, and the arresting officer may have had reasonable grounds to believe appellant would not have appeared pursuant to a citation. Although it may not have been the most advisable course to follow, the arrest and taking into custody of appellant was not illegal.

Appellant's fourth contention requires a more detailed inquiry. Having arrested appellant for failure to have a driver's license in his possession, the officer then proceeded to search his person, in the course of which the officer found a cigarette package in appellant's coat pocket containing marijuana cigarettes. Appellant contends the search of his person was unreasonable. The issue for our determination is whether the search was reasonable as *incident to the arrest* for a traffic violation.

Unreasonable searches and seizures are prohibited by the fourth amendment. United States v. Rabinowitz, 1950, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed.2d 653. Normally, the right to privacy yields to the

right to search only upon the determination of reasonableness by a judicial officer. Johnson v. United States, 1948, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436. There are a number of recognized exceptions to the requirement of a warrant, most notably the plain sight exception (Marron v. United States, 1927, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231), search of a vehicle when an officer has probable cause to believe it is carrying contraband (Carroll v. United States, 1925, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543), and search of the person and immediate surroundings as an incident to an arrest. (Harris v. United States, 1947, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399).

The authority of an arresting officer to search the person being arrested is embodied in Section 901.21, Florida Statutes, F.S.A.[1] Nevertheless, the Florida Supreme Court has determined incident searches to be unreasonable where a person is arrested for an alleged traffic violation only as a pretext for a warrantless search. Graham v. State, Fla.1952, 60 So.2d 186. Such searches are considered to be merely exploratory in nature and not truly incident to the arrest, since the search is the primary purpose of the arrest. Riddlehoover v. State, Fla.App.1967, 198 So.2d 651; Chapman v. State, Fla.App.1963, 158 So.2d 578.

In the case sub judice we have determined the officer had reasonable grounds for stopping appellant's automobile, and upon its being stopped to ask appellant to produce his driver's license, and upon appellant's failure to do so to arrest appellant for failure to have a driver's license in his possession. The arrest of the appellant in the instant case certainly was not a mere pretext for a search.

We therefore now turn to the issue of the reasonableness of the search incident to a bona fide traffic arrest.

As early as 1921, a method of testing the reasonableness of searches and seizures was set forth by the Florida Supreme Court:

"What is a reasonable or valid search or seizure is to be determined by the courts upon due consideration of the circumstances and manner in which the search or seizure is made by the officer. No search or seizure is permissible under the law without a proper warrant duly issued, except as a reasonable search and seizure may be allowed by law as an incident to a lawful arrest. Where an arrest without a warrant is allowed by law, as for an offense being committed or threatened in the presence of an officer authorized by law to make arrests for such offense, a reasonable search and seizure that is *properly* incident to a lawful arrest may be made in a reasonable and proper manner by the officer making the lawful arrest; *but the search and seizure should not be inappropriate to the reasonable requirements for making effective a lawful arrest.*" Haile v.

1. *F.S. 901.21 F.S.A. Search of person arrested; admission in evidence of property found.*

(1) When any sheriff, deputy sheriff, or other police officer in this state shall lawfully arrest any person, the officer making such arrest, or his assistant, may search the person so arrested, and if such search reveals the violation of any law, the officer shall hold such person upon a charge of violating the law, the violation of which has been so revealed, and anything found on such person or in his possession which tends to show the guilt of such person of the violation of law shall be admitted in evidence upon a trial in which such violation is charged, and such violation shall be deemed to be one committed in the presence of the officer.

(2) When any sheriff, deputy sheriff, or other police officer of this state, shall lawfully arrest any person for the violation of the road or speed laws, or for reckless driving, or driving while drunk or intoxicated, and shall find upon making such arrest that such person has unlawfully in his possession or control, concealed weapons, intoxicating liquors or stolen or embezzled property, contrary to law, it shall be deemed to be a violation of the law committed in the presence of the officer so making the arrest
• • •

Gardner, 1921, 82 Fla. 355, 91 So. 376; State ex rel. Stillman v. Merritt, 1924, 86 Fla. 164, 99 So. 230. (Emphasis added.)

See also 3 Fla.Jur., Arrest § 37. Subsequently, Florida courts in citing the above cases (Haile v. Gardner and Stillman v. Merritt), the italicized portions above emphasized were omitted, and the test for reasonableness became merely a determination of whether the search was incident to a lawful arrest. E. g., Italiano et al. v. State, 1940, 141 Fla. 249, 193 So. 48; Self v. State, Fla.1957, 98 So.2d 333. The decisions still iterate that the determination of the reasonableness of the search must be made in light of the surrounding circumstances and the manner in which the search was made, Range v. State, Fla. App.1963, 156 So.2d 534; Herring v. State, Fla.App.1960, 121 So.2d 807. But cases are legion in applying a categorical test of whether a lawful arrest preceded the search with little or no indication that other relevant circumstances were taken into consideration.

This categorical approach has been used to uphold searches incident to arrests for public drunkenness (Farmer v. State, Fla. App.1968, 208 So.2d 266), vagrancy (Donar v. State, Fla.App.1970, 236 So.2d 145; Schuster v. State, Fla.App.1970, 235 So.2d 30; Hanks v. State, Fla.App.1967, 195 So. 2d 49), and minor traffic violations (Self v. State, supra; Smith v. State, Fla.App. 1963, 155 So.2d 826, cert. dismissed, Fla., 167 So.2d 225).[2]

We will not compound the error nor blindly follow the categorical rule that a search incident to *any* arrest for the commission of *any* crime is lawful under the fourth amendment of the United States Constitution and Florida's Declaration of Rights. If the fourth amendment is to be meaningful in protecting the privacy of our citizens, courts must scrutinize searches and seizures allegedly coming within the exceptions to the requirement of a warrant. Amador-Gonzalez v. United States, 5 Cir. 1968, 391 F.2d 308. We subscribe to the view expressed in People v. Watkins, 1960, 19 Ill.2d 11, 166 N.E.2d 433:

> "The critical issue in each case must be whether the situation that confronted the officer justified the search. That question cannot be determined by an indiscriminate application of legal concepts that were evolved to meet quite different problems. A uniform rule permitting a search in every case of a valid arrest, even for minor traffic violations, would greatly simplify our task and that of law enforcement officers. But such an approach would preclude consideration of the reasonableness of any particular search, and so would take away the protection that the constitution is designed to provide."

Our determination of the reasonableness of the search in the case sub judice leads to an examination of the basis of the general rule that a search may be conducted as an incident to a lawful arrest. In that regard, one of our federal courts stated:

> "If a search for evidence of crime is justified as incident to an arrest, it must be because the evidence relates to the

2. It is important to describe the circumstances under which it was held lawful to search incident to an arrest for a minor traffic violation. In Self v. State, supra, a truck was stopped for driving with a defective taillight, and the beam of the patrolman's flashlight through the panels of the trunk revealed moonshine equipment. The canvas cover was removed voluntarily by the driver. The court held that the search was reasonable and proper under the circumstances as incident to a lawful arrest.

In Smith v. State, supra, the appellant was arrested because it was his fourth traffic violation, and prior to being taken to the police station for formal charging he was searched. This was held to be a reasonable incidental search. Concurring specially, however, Judge White emphasized that the law does not give officers unqualified authority to conduct a search after stopping a driver for a routine license check, but because there was no subterfuge, he concurred in the result.

crime for which the arrest is made * * * and not to some other charge the police had hopes of being able to bring against the person arrested." Jack v. United States, 9 Cir. 1967, 387 F.2d 471.

A search for fruits of the crime or for evidence has been upheld as properly incident to a lawful arrest in numerous Florida decisions.[3]

Query: May the search be for evidence of *any* crime, or is it limited to fruits of the crime for which the person was arrested?

Section 901.21, Florida Statutes, F.S.A., seems to indicate that a search is permissible to discover evidence of any crime. However, in State v. Aiken, Fla.App.1969, 228 So.2d 442, we determined the search to be reasonable as it related to the crime for which the arrest was made. In Brown v. State, Fla.1950, 46 So.2d 479, the scope of the search was also limited to whether the articles searched for were being utilized in perpetrating a crime for which the arrest was made. To so limit the scope of the search would require the search and seizure to be properly incident to a lawful arrest as thus set forth in the earlier Florida Supreme Court decisions.

This more restrictive interpretation of the proper scope of a search incident to arrest is in harmony with the development of the incidental search at common law. Searches incident to an arrest were allowed at common law if the property was likely to afford material evidence for the prosecution of the offender with respect to the crime for which he was arrested. Note, Searches of the Person Incident to Lawful Arrest, 69 Col.L.Rev. 866 (1969).

The language of the fourth amendment implies that a search will comply with its protective requirements only if the scope of the search is no broader than legitimate governmental objectives justify. If searches are permitted on less evidence than is required for the usual search, the intrusiveness of searches must also be more limited. This approach is the result of the acceptance of the concept of variable probable cause, which means that the probable cause necessary for the search varies with the situation. Note, Scope, Limitations for Searches Incident to Arrest, 78 Yale L.J. 433 (1969).

[9] There must be a nexus between the offense and the object sought for a search conducted in connection with an arrest to be truly *incident* to it. There are Florida cases which support this conclusion. In Courington v. State, Fla.1954, 74 So.2d 652, the Florida Supreme Court determined that "the search of the trunk of appellant's car was not appropriately incident to making effective a lawful arrest for driving while intoxicated." The court similarly determined in Slater v. State, Fla.1956, 90 So.2d 453, that the search of an automobile revealing lottery tickets was not incidental to an arrest for a traffic violation. See also Brown v. State, Fla.1956, 91 So.2d 175; State v. Simmons, Fla.1956, 85 So.2d 879; Collins et al. v. State, Fla.1953, 65 So.2d 61.

Determining the reasonableness of a search by examining the rational nexus with the arrest is much more desirable than examining the motive of the arresting officer. Amador-Gonzalez v. United States, supra. The bad faith test used in sham arrest cases leaves room for abuse where the arrest is clearly proper and no inference of bad faith is justified. Merely because the officer had a bona fide motive in searching the arrested person does not automatically mean that the search was *reasonable* under the fourth amendment. In arrest situations, we conclude that the

3. Fletcher v. State, Fla.1953, 65 So.2d 845; Gibson v. State, Fla.App.1965, 180 So.2d 685; Chippas v. State, Fla.App. 1965, 180 So.2d 355; Gray v. State, Fla. App.1965, 177 So.2d 868; Lyons v. Town of Lake Park, Fla.App.1963, 153 So. 2d 21; Cameron v. State, Fla.App.1959, 112 So.2d 864; Bozeman v. State, Fla. App.1958, 102 So.2d 648.

only effective means of determining reasonableness is to examine whether the search was properly incident to the arrest, i. e., whether a nexus existed between the arrest and the articles sought.

The true value of this test comes to light when applied to traffic arrest situations. With the exception of driving while intoxicated (where a search for open liquor bottles is reasonable), there are no fruits or instrumentalities of the crimes which comprise traffic law violations. A search incident thereto bears no causal relation to the types of events for which the accused was apprehended. 1 Varon, Searches, Seizures and Immunities 203 (1961). It would follow, therefore, that most searches and seizures following an arrest for a traffic violation are not properly incident thereto and therefore are unreasonable and prohibited by the fourth amendment.

Some authorities have asserted that a search following a traffic arrest is always unlawful and that there are no exceptions. Sobel, Search and Seizure 119 (1964). To state the rule in such unequivocal terms is to again adopt a categorical approach to search and seizure questions. We emphasize that we reject such an approach, since each situation must be judged in light of the circumstances presented, and that hard and fast rules interfere with a proper determination. While most searches following an arrest for a traffic violation will undoubtedly be improper, we do not preclude the possible existence of other circumstances that would make the search and seizure reasonable.

[10] There is still another aspect of traffic arrests which must be considered. It is widely recognized that an arresting officer not only has the right and duty to search the arrested person for fruits and instrumentalities of the offense and for evidence as incident to the arrest, but he also has the right to protect himself and to prevent possible escape by searching for weapons. This is normally included with the other circumstances discussed above as "incident" to a lawful arrest. Green v. State, Fla.App.1966, 191 So.2d 607; 3 Fla. Jur., Arrest § 37; 4 Wharton's Criminal Law and Procedure § 1538. For the purposes of our discussion here, however, we choose to consider this justification for a search separate and apart from searches incident to an arrest.

[11] It is not the arrest which gives the officer the authority to make a protective search, but rather reasonable cause to believe the suspect is armed. Further, even if there is no reasonable cause to believe the suspect is armed, when he is taken into custody the officer has a right to search for any hidden weapon which could be used against him to effect escape. Nixon v. State, Fla.App.1965, 178 So.2d 620. Under the concept of incidental search as discussed above, then, a protective search is not actually "incident" to the arrest.

Even with an arrest for a traffic violation, the officer may have reason to conduct a protective search of the person arrested. Some courts have indicated that this is the only justification for a search in these circumstances. State v. Coles, 1969, 20 Ohio Misc. 12, 249 N.E.2d 553; Ciulla v. State, Tex.Civ.App.1968, 434 S.W.2d 948.

[12] Once the search is initially justified, it must be reasonably limited in scope to the circumstances which justified the search in the first place. Terry v. Ohio, supra. The mere fact of the arrest does not give to the officer an absolute right to search the vehicle or the occupants indiscriminately. Lane v. Commonwealth, Ky. 1964, 386 S.W.2d 743, 10 A.L.R.3d 948. The search must be limited to a search for *weapons*, which normally entails only "patting down" the suspect.

[13] We turn now to examining the search in the case at bar in light of the law as we have discussed it.

Appellant was initially stopped and detained on suspicion of driving while intoxi-

cated, but he was arrested for failure to have in his possession a valid driver's license. It was for this offense that he was to be taken to the police station to be formally charged.

Under the circumstances presented in this case, there could have been no valid search as an incident to the arrest. There were no instrumentalities of the crime except the car itself, no fruits of the traffic offense and no evidence to be preserved for trial. Any search conducted solely as an incident to the arrest was unreasonable and therefore in violation of the fourth amendment and of the Florida Declaration of Rights.

When the officer determined to arrest appellant and to place him in the squad car to be taken to the police station, he had a right to conduct a custodial search of appellant's person for his own protection and to prevent escape. An officer cannot be expected to place a suspect in the rear seat of his squad car without first searching him for weapons which might be used against him en route to the station house.

The custodial search is limited to weapons and instrumentalities for escape. In the instant case the officer removed a cigarette package from appellant's coat pocket and inspected the contents. Surely he did not expect to find a dangerous weapon inside the small, light cigarette package. We do not require the arresting officer to close his eyes to evidence of other crimes which he may discover in the course of the search, but we do require the officer to limit the scope of his search to one for weapons or instrumentalities of escape. The only reasonable conclusion to be drawn from the officer's conduct is that he was searching for something other than a weapon, and under these circumstances such a general search is unwarranted and unlawful. The arrest was not made as a pretext for the search; nevertheless, to allow the search to go beyond a pat-down for weapons would be to circumvent the rights guaranteed by the fourth amendment of the United States Constitution.

[14] The argument asserted by the state that the search was lawful, since appellant would have been thoroughly searched at the police station, is without merit. The officers at the police station would have had no right to search appellant unless he was to have been incarcerated. The probability that appellant would be issued a citation or notice or released on bail or on his own recognizance is too great to allow the arresting officer to conduct the search at the scene of the arrest. The search is not to be allowed until the circumstances are such that it is reasonable. A search that may become reasonable at a later time may not be made prematurely.

Since the search was unlawful, the evidence seized should have been suppressed.

Due to disposition of the case, it is not necessary to treat the remaining two points raised by appellant.

Accordingly, the order of probation is reversed and the cause remanded with directions to discharge the appellant from further prosecution under Information F 69-33.

Reversed and remanded, with directions.

LEE, THOMAS E., Jr., Associate Judge, concurs.

REED, J., concurs in conclusion.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1669

JAMES E. GUSTAFSON,

Petitioner,

VERSUS

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of Florida, to which the Petition for Writ of Certiorari is directed, is reported at 258 So.2d 1 (Fla.1972).

The opinion of the District Court of Appeal of Florida, Fourth District, which was quashed by the Florida Supreme Court's decision, is reported at 243 So.2d 615 (4DCA Fla. 1971). Both opinions are contained in the Appendix of the Petition.

JURISDICTION

The decision of the Florida Supreme Court was rendered on January 26, 1972. Petitioner invokes jurisdiction of this Court under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether a police officer may search the driver of an automobile, when the driver has first been legally stopped and has thereupon been

lawfully arrested for failure to have a driver's license in his possession.

STATEMENT

In the early morning hours of January 12, 1969, a police officer in Eau Gallie, Florida, observed that the automobile which Petitioner was driving was weaving across traffic lanes. The officer stopped the car, to find out if Petitioner "had been drinking or something."

When Petitioner informed the police officer that he did not have a driver's license with him, the officer arrested Petitioner for the failure to so produce a driver's license, in accordance with Florida Statutes §322.15.

A search of Petitioner's person, pursuant to the aforementioned valid arrest, revealed that a cigarette package contained several marijuana cigarettes. Petitioner was then charged with possession of marijuana.

A non-jury trial on the marijuana charge culminated with a finding of guilt. Adjudication was withheld, and Petitioner was placed on probation.

Appeal was then taken to the District Court of Appeal of Florida, Fourth District. The Appellate Court reversed, holding that the officer's search of Petitioner was unreasonable. Gustafson v. State, 243 So.2d 615 (4DCA Fla. 1971).

Thereupon, the State of Florida sought certiorari in the Florida

Supreme Court. The State's highest Court granted the writ and quashed the opinion of the Fourth District Court of Appeal. State v. Gustafson, 258 So.2d 1 (Fla. 1972).

While clearly not condoning unreasonable searches when there is no reason therefor, the Florida Supreme Court held that a search incident to a lawful arrest must not be limited solely to fruits of the particular crime for which the individual was arrested.

ARGUMENT

The crucial question in the case at bar can best be approached by a brief recital of the steps leading to the search of Petitioner.

The initial query to be answered

must be whether or not the police officer had a right to stop Petitioner's automobile. The policeman noticed Petitioner's car crossing traffic lanes; at that point, the officer had a reasonable suspicion that the crime of driving while intoxicated[1] might have been committed. The rationale expounded by this Court in Terry v. Ohio, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) allows that police are permitted to stop a person and detain him briefly upon the suspicion of the individual's involvement in a criminal activity. The right to detain on less than probable cause has been applied to the stopping of

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[1]Florida Statutes §317.201

automobiles, in Capitoli v. Wainwright, 426 F.2d 868 (5th Cir. 1970), cert. denied, 400 U.S. 906, 91 S.Ct. 148, 27 L.Ed.2d 144 (1970).

Once the law enforcement officer stopped Petitioner, there is no doubt that the officer was authorized by Florida law to ascertain whether or not the driver had a driver's license in his possession.[2]

Having failed to produce a driver's license, Petitioner was guilty of a misdemeanor under the last aforementioned Florida statute. A peace officer is expressly authorized to arrest without a warrant when a misdemeanor is committed in his presence.[3]

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[2] Florida Statutes §322.15

[3] Florida Statutes §901.15(1)

The arrest of Petitioner was lawful, therefore, and is not questioned before this Court.

The constitutionality of the search of Petitioner's person after the above arrest can now be placed into proper perspective. Petitioner's emphatic reliance on Terry v. Ohio, supra, must be scored by Respondent. Terry deals with the permissible extent of a search conducted pursuant to a stop and frisk. The case at bar, on the other hand, involves a search pursuant to a valid arrest.

Petitioner's position is that a search after a lawful arrest is to be limited to fruits of the particular crime for which the arrest was effectuated.

A better rationale has been set forth by the Florida Supreme Court in their decision below. The Court explicitly allowed that a routine stopping of a motorist does not normally occasion any search, and that when a person is stopped in a vehicle merely as a pretext for a warrantless search, the search is unreasonable.

The Florida Supreme Court held, however, that once a lawful arrest has been made, a reasonably ensuing search is proper without regard to whether the crime in question and the material ultimately seized are related.

The foregoing decision is eminently correct, and is in accord with

prior decisions of this Honorable Court. The Fourth Amendment right does not grant immunity from search and seizure incident to lawful arrest. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Reasonable search and seizure after a lawful arrest may be carried out even if the articles seized are instruments of the commission of a wholly unrelated offense. Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), rehearing denied, 362 U.S. 984, 80 S.Ct. 1056, 4 L.Ed.2d 1019 (1960). Nor does the Fourth Amendment prohibit, incident to a lawful arrest, the seizure of any material of which possession itself is proscribed. See 79 C.J.S. Searches and Seizures §26, and cases

cited therein.

Based on the foregoing authority, it is apparent that the decision below in the Florida Supreme Court was correct. The question presented by Petitioner is neither vital nor novel. No great reason exists for the granting of a writ of certiorari, and the writ should be denied.

CONCLUSION

On the basis of the foregoing argument and legal authority, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondent in Opposition has been furnished to Honorable Michael F. Cycmanick at Law Offices of James M. Russ, 441 First Federal Building, Orlando, Florida 32801, by mail this 6th day of October, 1972.

Fredric J. Scott

FREDRIC J. SCOTT
Assistant Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1669

JAMES E. GUSTAFSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Florida which the petitioner prays that this Court review is reported at 258 So.2d 1 (Fla.1972) and reproduced in the Appendix to the Petition (Petition App. 1a-4a). The decision of the District Court of Appeal of Florida, Fourth District, which was quashed by the Florida Supreme Court's opinion is reported at 243 So.2d 615 (Fla.App.1971) (Petition App. 5a-15a).

JURISDICTION

The judgment of the District Court of Appeal of Florida, Fourth District, was rendered and entered on February 8, 1971 (Petition App. 5a). The judgment and opinion of the Florida Supreme Court which the petitioner seeks to have reviewed was entered on January 26, 1972 (Petition App. 1a-4a). The petition for writ of certiorari was filed in this Court on June 22, 1972 and was granted on March 19, 1973.

The jurisdiction of this Court is invoked under Section 1257(3), Title 28, U.S.C.A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated . . ."

Section 12 of the Declaration of Rights of the Constitution of the State of Florida (1968) provides, in part:

> "§12. *Searches and seizures*—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . shall not be violated. . . ."

Florida Statutes (1967), Section 322.15 provides:

"822.15 License to be carried and exhibited on demand.—Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same, upon demand of a patrol officer, justice of the peace, a peace officer, or a field deputy or inspector of the department. However, no person charged with violating this section shall be convicted if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

QUESTIONS PRESENTED

In the petition for writ of certiorari filed in this case, the following reasons were urged in support of granting the writ:

THE FOURTH AMENDMENT AND THIS COURT'S DECISIONS IN *TERRY V. OHIO*, 392 U.S. 1 (1968) AND *SIBRON V. NEW YORK*, 392 U.S. 40 (1968) PROHIBIT THE CONDUCTION OF AN EXTENSIVE SEARCH OF A MOTORIST'S PERSON AND CLOTHING BY A POLICE OFFICER WHO HAS STOPPED THE MOTORIST ON GROUNDS OF MERE SUSPICION OR CURIOSITY AND WHO HAS LEARNED IN RESPONSE TO ROUTINE QUESTIONING THAT THE MOTORIST HAS VIOLATED A MINOR TRAFFIC REGULATION IN NOT HAVING HIS MOTOR VEHICLE OPERATOR'S LICENSE IN POSSESSION WHILE DRIVING.

Implicit in this contention, the following basic questions are presented for the Court's determination:

1. Whether the Fourth Amendment prohibits as unreasonable in purpose and scope the extensive evidence search of a person arrested for a minor traffic violation, which offense has no evidence related to it.

2. Whether the Fourth Amendment prohibits as unreasonable in purpose and scope the extensive evidence search of a citizen taken into custody for the violation of a minor traffic offense.

STATEMENT OF THE CASE

The petitioner and a companion were returning to their college dormitory in the early morning hours of Sunday, January 12, 1969, after having taken their evening dates home. While the petitioner was driving his automobile through the city of Eau Gallie, Florida, a municipal police officer on routine patrol observed the vehicle to weave slightly into another traffic lane. The petitioner had not violated any traffic or speed laws (App. 16, 55, 57, 63), his driving presented no hazard to other motorists, people on the roadway, or property adjacent to the road (App. 35-36, 55), and his driving activity was not such as to constitute, in the officer's opinion, an offense (App. 17, 21-22, 26-27, 58-59, 62-63, 67). The officer stopped the vehicle to "check it out" but admitted that he would not have detained the automobile had he known the occupants (App. 19-20).

After stopping the vehicle, the officer asked the petitioner for his driver's license. The petitioner informed the officer that he was a student and had left his driver's license in his dormitory room in the neighboring city of Melbourne, Florida. The petitioner was then arrested for failure to have his vehicle operator's license in his possession.[1] The officer then undertook an extensive search of the petitioner's person and clothing and determined to place him in the patrol car to be taken to the police station. The petitioner had been orderly and cooperative, he did not appear to the officer to be frightened, nervous or upset (App. 7-10). The petitioner's passenger, who had not been arrested for any offense, was also thoroughly searched and subsequently taken to the police station (App. 38-39). The officer testified that the passenger, who had not been charged with any offense, would have been arrested for "disorderly conduct" and would have been forcibly placed in the patrol car if the passenger had not acquiesced in or complied with the officer's demands (App. 46-47).

During the police officer's search, a cigarette package was removed from the petitioner's coat pocket and the officer proceeded to examine its contents. This examination revealed the existence of several home-made cigarettes.

The petitioner was ultimately charged with the possession of three marijuana cigarettes and stood trial on this accusation.

Through timely motions to suppress, the petitioner challenged the legality of his arrest and the search and seizure of his tangible evidence which had formed the basis

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[1]Fla. Stat. §322.115 (1967).

of the prosecution. His objections and motions were denied and he was found guilty of the possession charge. The trial judge entered an order of probation withholding adjudication of guilt and an appeal was taken.

The petitioner sought review of the trial court rulings in the District Court of Appeal of Florida, Fourth District. The District Court of Appeal held the search to be unreasonable under the circumstances since it was not related to the petitioner's arrest for a minor traffic charge and since it proceeded far beyond a mere custodial search limited to weapons or instrumentalities for escape. The order of probation was reversed and the case was remanded with directions to the trial court to discharge the petitioner from further prosecution on the charge. *Gustafson v. State*, 243 So.2d 615 (4th D.C.A.Fla.1971) (Petition App. 5a-15a).

The State of Florida petitioned the Supreme Court of Florida for a writ of certiorari. The Florida Supreme Court took jurisdiction of the cause and subsequently quashed the opinion of the District Court of Appeal. *State v. Gustafson*, 258 So.2d 1 (Fla.1972) (Petition App. 1a-4a).

The decision of the Florida Supreme Court branded the District Court's requirement that such searches be either related to the charge for which the arrest is made or limited to a search for weapons or instrumentalities for escape, to be an outright "reversal" of former Florida decisions, containing "reversionary" views contrary to an entire body of established law and a "radical departure" from established reasonable standards. The petitioner had contended that this Court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Sibron v. New York*, 392 U.S. 40 (1968) were clearly applicable to the search and seizure question

in this case. The Florida Supreme Court, however, failed to even cite *Terry* or *Sibron* in the course of its opinion.

The decision presented for review is predicated on the rationale that:

> "A reasonable suspicion (which was present here)[2] that the driver was intoxicated not only justified stopping the vehicle but also justified searching for intoxicants or drugs inasmuch as our statute makes the influence of either an offense . . ." (Petition App. 2a).

In the course of the same opinion, the Florida Supreme Court held that:

> "In the routine stopping of a motorist by an officer, as for a 'failure to yield right of way', etc., where a traffic citation may be issued, there does not arise any reason for a general search and none would be authorized . . ." (Petition App. 8a).

It is difficult to imagine how an officer's subjective determination to stop a motorist merely to "check him

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[2]Justice Dekle's finding of the presence of "this reasonable suspicion" can, unfortunately, only be supported by imagination or speculation since the Florida Supreme Court never had the benefit of the transcripts of testimony from the pretrial and trial proceedings or the record on appeal. The petitioner respectfully requests the Court to review Footnote 3 of his petition filed in this case in connection with the Florida Supreme Court's determination of this factual issue. It is tragic that a decision of such dynamic impact on fundamental Fourth Amendment protections can be predicated upon a factual determination by an appellate court which never had the benefit of the record.

out" would justify a full scale evidence search, yet provide no basis for such an extensive search if his reasons for stopping the vehicle rested on the fact that the motorist actually committed a traffic offense, i.e., "failure to yield right of way."

Following the announcement of this decision, the instant petition for writ of certiorari was filed in this Court on June 22, 1972, and granted on March 19, 1973.

SUMMARY OF ARGUMENT

Fourth Amendment protections cannot be diluted or diminished through semantic distinctions between the "stopping" of a citizen and his "arrest", or between a "frisk" and a "search" of his person. *Terry v. Ohio*, 392 U.S. 1 (1968). We submit that it cannot be validly argued that the citizen in any way loses the benefits and protections of the Fourth Amendment simply because he is operating a motor vehicle at the time of his initial encounter with governmental authority. The Fourth Amendment protects "people" rather than "places." *Katz v. United States*, 389 U.S. 347 (1967).

This case and the decision in *United States v. Robinson*, 471 F.2d 1082 (D.C.Cir.1972), cert. granted, 93 S.Ct. 1500 (1973) (No. 72-396, 1972 Term), present for the Court's determination, a significant opportunity to provide firm and objective guidelines on the application of the Fourth Amendment's demand for reasonableness in the most frequent area where the majority of our citizenry have their first encounter with law enforcement officials in an adversary posture. The situation we speak of is that

involving the arrest of a citizen for violation of a routine traffic ordinance or regulation.

In this brief, we concede the validity of the police officer's authority to:

(a) initially stop the petitioner's automobile;

(b) momentarily detain the petitioner;

(c) routinely request that the driver produce his operator's permit; and,

(d) assume custody of the petitioner and transport him to the station house for further inquiry upon learning that the motorist did not have his permit in his possession.

We make these concessions not for the sake of brevity or in avoidance of argument on these issues, but rather to provide the avenue for focusing the Court's attention to the fundamental question presented. We submit that the circumstances of this case require the establishment of Fourth Amendment principles of "reasonableness" in the activity of a police officer who determines to take a citizen into custody on the basis of a minor traffic offense. We wish to avoid confusing this issue with collateral questions of subjective or motivational factors that may have preceded the policeman's initial decisions.

We urge that these cases provide the basis for announcing workable standards to reach the goal of eliminating unconstitutional searches by placing "emphasis . . . on the objective relationship between the nature of the

offense and the nature (circumstances) of the search, rather than on the motivative cause of the arrest." *Amador-Gonzales v. United States*, 391 F.2d 308, 315 (5 Cir.1968).

The central issue in this case concerns the question of "reasonableness" of the police officer's activities in light of his decision to arrest and take the petitioner into custody. In the course of this brief we shall demonstrate that the extensive searching activity engaged in by the officer was violative of the Fourth Amendment because it was unreasonable both in purpose and in scope.

First, we contend that the Fourth Amendment prohibits as unreasonable in purpose and scope the extensive evidence search of a person arrested for a minor traffic violation, which offense has no evidence related to it. Since there are no fruits or instrumentalities to be found by the officer in connection with such an offense, there exists absolutely no valid or legitimate purpose to support a warrantless evidentiary search.

Secondly, we will show also that the Fourth Amendment is abridged by the police officer who engages in an extensive evidence search of a citizen taken into custody for the violation of a minor traffic offense. We submit that allowing the police officer to proceed with an extensive body search in such cases where there are no objective or articulable facts to indicate the officer is dealing with an armed or dangerous individual is to diminish the protections of the Fourth Amendment to motorists on Florida's highways to the extent that the constitutional protection exists in the abstract without meaning, vitality or enforcement.

ARGUMENT

THE FOURTH AMENDMENT AND THIS COURT'S DECISIONS IN *TERRY V. OHIO*, 392 U.S. 1 (1968) AND *SIBRON V. NEW YORK*, 392 U.S. 40 (1968) PROHIBIT THE CONDUCTING OF AN EXTENSIVE SEARCH OF A MOTORIST'S PERSON AND CLOTHING BY A POLICE OFFICER WHO HAS STOPPED THE MOTORIST ON GROUNDS OF MERE SUSPICION OR CURIOSITY AND WHO HAS LEARNED IN RESPONSE TO ROUTINE QUESTIONING THAT THE MOTORIST HAS VIOLATED A MINOR TRAFFIC REGULATION IN NOT HAVING HIS MOTOR VEHICLE OPERATOR'S LICENSE IN POSSESSION WHILE DRIVING.

The Florida Supreme Court's decision is grounded upon what that court, without the benefit of the record, determined to be a "reasonable suspicion . . . that the [petitioner] was intoxicated" (Petition App. 2a) which justified not only stopping the vehicle but also searching for intoxicants or drugs. That court adhered to the position often considered by other authorities as the "categorical approach" in authorizing the "incidental search that *reasonably* ensues after a legal arrest . . ." (Petition App. 4a). In failing to consider the applicable and objective Fourth Amendment principles relating to the reasonableness of the police officer's extensive searching activities under the circumstances presented in the instant case, the Florida Supreme Court handed down a decision which diminishes the Fourth Amendment protections available

to the millions of motorists traveling on Florida's highways to such an extent that police intrusions into their privacy need now be governed only by the "suspicion" standards applicable to border searches.[3]

The Florida decision is contrary to the views of all other authorities that have addressed themselves to the fundamental issues presented.[4] We submit that the decision must be reversed because the extensive intrusion into the petitioner's personal security and privacy could not be considered reasonable in either purpose or scope since there were no fruits or instrumentalities of the offense for which the petitioner was placed under arrest and the intrusion far exceeded any authority that may have existed for a protective pat-down or custodial frisk for the protection of the officer.

---

[3]In using the term "motorists" we refer not only to vehicle operators but also their passengers as well since the other occupant in the petitioner's car was also thoroughly searched, even though he was not charged with any offense at all (App. 38-39). The officer additionally testified that the passenger would have been arrested for "disorderly conduct" and forcibly placed in the patrol car if he had not submitted to the officer's demands (App. 46-47).

[4]See, cases and authorities cited in Argument A., pp. 14-15, *infra*. Florida's lower appellate and trial courts are presently bound by the instant decision. Nevertheless, writers from two of the state's law schools have published articles on this case. Each of these notes questions the soundness of the reasoning and the grasp of the real issues presented for review by Florida's highest judicial body. See, Wills and Caruana, *Criminal Law and Procedure*, Tenth Survey of Florida Law, Part Two, 26 U.Mia.L.Rev. 289, 314 (1972); Comment, *Criminal Law: Personal Searches Incident to Traffic Arrests—No Nexus Necessary?*, 25 U.Fla.L.Rev. 239 (1972).

A.

THE FOURTH AMENDMENT PROHIBITS AS UNREASONABLE IN PURPOSE AND IN SCOPE THE EXTENSIVE EVIDENCE SEARCH OF A PERSON ARRESTED FOR A MINOR TRAFFIC VIOLATION, WHICH OFFENSE HAS NO EVIDENCE RELATED TO IT.

> . . . [T]he most basic constitutional rule in this area is that "searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions . . ." *Coolidge v. New Hampshire*, 403 U.S. at 454-455.

In the case of most routine traffic violations there are no fruits or instrumentalities which might be considered as evidence of the offense. Therefore, it cannot be validly argued that the exigencies of the situation surrounding the routine traffic offense requires any evidentiary search whatsoever. Simply stated, no legitimate purpose could be advanced through the conducting of an exploratory evidence search because such an intrusion would be patently unreasonable from its inception.

The fundamental principle recognizing the non-existence of evidence to be found in the case of a routine traffic arrest has been recognized and followed by virtually every appellate court in the country which has considered the issue. See *People v. Superior Court of Los Angeles County*

[*Simon*], 7 Cal.3d 186, 101 Cal.Reptr. 837, 496 P.2d 1205 (1972) (*en banc*); *People v. Watkins*, 19 Ill.2d 11, 166 N.E. 2d 433 (1960); *State v. Curtis*, 290 Minn. 429, 190 N.W.2d 681 (1971); *People v. Marsh*, 20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967); *Lawson v. State*, 484 P.2d 1337 (Okl.Ct.Crim.App.1971); *Ricci v. State*, 506 P.2d 601 (Okl.Ct.Crim.App.1973); *Barnes v. State*, 25 Wis.2d 116, 130 N.W.2d 264 (1964); and the numerous authorities referred to in both *Amador-Gonzalez v. United States*, 391 F.2d 308, n.8 (5 Cir.1968) and *United States v. Robinson*, 471 F.2d 1082, n.39 (D.C.Cir.1972), cert. granted, 93 S.Ct. 1500 (1973) (No. 72-936, 1972 Term).

In the present case, after the officer determined that the petitioner had left his permit in his nearby dormitory room, he was not at liberty to initiate an extensive body search since the intrusion into the citizen's personal privacy and clothing could not possibly have led to evidence supporting the charge. This warrantless exploratory police activity was patently unreasonable and violative of the petitioner's right to personal security and privacy guaranteed by the Fourth Amendment.

B.

THE FOURTH AMENDMENT PROHIBITS AS UNREASONABLE IN PURPOSE AND SCOPE THE EXTENSIVE SEARCH OF A CITIZEN TAKEN INTO CUSTODY FOR THE VIOLATION OF A MINOR TRAFFIC OFFENSE.

In *Chimel v. California*, 395 U.S. 752 (1969) this Court retraced the historical background surrounding the

concept of warrantless searches "incident to lawful arrests". In reconsidering the correctness of dicta and express holdings in the previous cases of *Weeks v. United States*, 232 U.S. 383 (1914); *Agnello v. United States*, 269 U.S. 20 (1925); *Marron v. United States*, 275 U.S. 192 (1927); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Harris v. United States*, 331 U.S. 145 (1947); *Trupiano v. United States*, 334 U.S. 699 (1948); and *United States v. Rabinowitz*, 339 U.S. 56 (1950), the Court relied upon Mr. Justice Frankfurter's dissent in *Rabinowitz* in rejecting non-objective or talismanic invocations of the term "reasonable" in and of itself as the measure of Fourth Amendment protection in such cases.

In *Chimel*, emphasis was placed upon the critical language of the Court's opinion of the previous Term in *Terry v. Ohio*, 392 U.S. 1 (1968) repeating that ". . . [t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible . . ." 395 U.S. at 762.

In the present case we have already conceded the authority to the police officer to temporarily detain and question the petitioner and the legality of his decision to take the petitioner into custody. In light of the facts and circumstances existing and known to the officer at the time these decisions were made, however, there existed absolutely no authority for undertaking a full scale exploratory body search. We submit that it is simply impossible for the State of Florida to ". . . point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [such an] intrusion. . . ." *Terry v. Ohio*, 392 U.S. at 21.

The officer in the present case never exhibited any manifestations of fear for his personal safety in dealing with the petitioner or the other passenger in the automobile. The petitioner had been responsive and cooperative and did not appear to be frightened, nervous or upset (App. 7-10). His clothes were orderly, he demonstrated no difficulty in exiting the automobile and he had no trouble standing up (App. 8-9). The officer testified that the petitioner had not violated any traffic or speed laws (App. 16, 55, 57, 63), his driving presented no hazard to other motorists, people on the roadway, or property adjacent to the road (App. 35-36, 55), and his driving activity was not such as to constitute, in the officer's opinion, an offense (App. 17, 21-22, 26-27, 58-59, 62-63, 67). After stopping the automobile he did not detect an odor of alcohol on the petitioner's person, the petitioner did not stumble or weave and did not have a slurred manner about his speech (App. 58-59).

These factors when considered in light of the fact that the offense providing the basis for the arrest was trivial in nature[5] and that there was a total absence of any indication that the officer was dealing with an armed and dangerous individual strongly militate against a judicial pronouncement characterizing the full scale body search that ensued as being reasonable. Indeed, the fact that the passenger in the petitioner's vehicle was subjected to similar intrusions of his privacy, when he had not been ar-

[5]The charge of failing to have vehicle operator's permit in possession while driving is the most minor infraction of Florida's motor vehicle regulations. The legislation covering this charge in existence at the time the petitioner was arrested, Fla. Stat. §322.15 (1967) provided that a conviction could not even be secured if the accused later produced in court his operator's license if it was issued and valid at the time of the arrest. In the present case the original charge was eventually dismissed or nol-prossed in the city court when the petitioner produced his valid permit (App. 60).

rested or charged with any offense, clearly illustrates the patent unreasonableness of the officer's conduct.

Since the circumstances in the present case fail to indicate any basis for belief that the officer was contending with an armed and dangerous individual or that the petitioner's actions indicated reasonable grounds for suspecting other criminal activity aside from the minor traffic offense, the officer's physical intrusion into the citizen's privacy had to be limited to a protective or custodial pat-down frisk for weapons. The scope of the search in the instant case far exceeded these reasonable limitations.

The seizure of three marijuana cigarettes found after the officer had removed an ordinary cigarette container from the petitioner's inside coat pocket cannot be sustained as a protective measure on the part of the policeman. In this respect the decision of the Florida Supreme Court appears to stand alone in opposition to all of the other reported opinions of other courts which have considered this narrow issue. See *United States v. Robinson*, 471 F.2d 1082 (D.C. Cir.1972); *United States v. Del Toro*, 464 F.2d 520 (2 Cir. 1972); *United States v. Lindsey*, 451 F.2d 701 (3 Cir.1971); *United States v. Davis*, 441 F.2d 28 (9 Cir.1971); *Tinney v. Wilson*, 408 F.2d 912 (9 Cir.1969); *United States v. Lopez*, 328 F.Supp. 1077 (E.D.N.Y.1971); *United States v. Gonzalez*, 391 F.Supp. 563 (D.Conn.1970); *United States v. Hostetter*, 295 F.Supp. 1312 (D.Del.1969); *State v. Anonymous*, 280 A.2d 816 (Conn.Cir.Ct.1971). Similarly, articles on this question in various law review publications recognize the necessity for the scope-limitation principle in providing objectivity in measuring the Fourth Amendment's protections. *See, e.g.*, Case Comment, *Constitutional Law: Fourth Amendment: Marijuana Seized in "Pat-Down" Incident to Traffic Violation Inadmissible in Sub-*

sequent Criminal Prosecution, 57 Minn.L.Rev. 414 (1972); Wills and Caruana, *Criminal Law and Procedure*, Tenth Survey of Florida Law, Part Two, 26 U.Mia.L.Rev. 289, 314 (1972); and Case Comment, *Criminal Law: Personal Searches Incident to Traffic Arrests — No Nexus Necessary?* 25 U.Fla.L.Rev. 289 (1972) in addition to those authorities considered by Judge Wright in n.44 of *United States v. Robinson*, *supra*, 471 F.2d at 1107.

In closing we wish to call the Court's attention to some of the pertinent factual distinctions between the instant case and the situation confronting the police officer in *Robinson*, *supra*. Among other things, it is to be noted here that Mr. Gustafson had experienced no previous encounters with the officer in this case, the offense he was arrested for was benign or trivial in nature—carrying with it no mandatory minimum sentence, the officer was not even required to take Mr. Gustafson into custody, there existed no department policies requiring full scale body searches, the officer expressed no objective indications of fear for his own well being or that of others in dealing with Mr. Gustafson, and there was nothing at all extraordinary about the fact that Mr. Gustafson had a normal cigarette package in his inside coat pocket.[6] We are certain that under these circumstances even the dissenting judges in *Robinson* would agree that the extensive physical intrusion on Mr. Gustafson's person and privacy was violative of the Fourth Amendment.

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[6]In dissenting from the majority in *Robinson*, Judge Wilkey considered police officer Jenks' activities to be reasonable since the frisk revealed the existence of an unusual or irregular cigarette container. 471 F.2d 1082 at 1119, and 1123. Judge Wilkey stated ". . . if the cigarette package had appeared to contain cigarettes on these facts alone in this case, Jenks might have been unjustified in opening the package, his inquiry in this sector would have been satisfactorily resolved . . ." 471 F.2d at 1119.

CONCLUSION

In authorizing a full scale exploratory body search on the basis of mere suspicion or curiosity as being "incident to an arrest" for a trivial traffic infraction, the Florida Supreme Court's decision marks a dramatic departure from established objective considerations of "reasonableness" in applying Fourth Amendment principles.

It is earnestly contended that the decision presented for review must be reversed because:

1. The Fourth Amendment prohibits as unreasonable in purpose and scope the extensive evidentiary search of a person arrested for a minor traffic violation, which offense has no evidence related to it; and,

2. The Fourth Amendment prohibits as unreasonable in purpose and scope the extensive evidence search of a citizen taken into custody for the violation of a minor traffic offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, to the Honorable Robert Shevin, Attorney General of the State of Florida, the Capitol, Tallahassee, Florida, and to the Honorable Nelson E. Bailey, Esquire, Assistant Attorney General of Florida, 225 Pan-A Building, West Palm Beach, Florida, this ____ day of May, 1973.

_____

Attorney

Supreme Court, U.
FILED
JUN 11 19
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1669

JAMES E. GUSTAFSON,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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Searches of the Person Incidental to Lawful Arrest, 69 Colum.L.Rev.866, (1969); e.g., Hanks v. State, 195 So. 2d 49 (3 DCA Fla.1967) 15

STATEMENT OF THE FACTS

Petitioner James Gustafson stands convicted in a Florida state court for the crime of possession of an illegal drug, marijuana. Prior to his non-jury trial on that offense Gustafson sought, in the state trial court, to suppress the marijuana as evidence against him on grounds it was the fruit of an unlawful search. A transcript of relevant portions of the pre-trial evidentiary hearing on Petitioner Gustafson's motion to suppress is before the United States Supreme Court, at Petitioner's Appendix, 48-67. Petitioner Gustafson contends in the present United States Supreme Court certiorari review that the Florida state courts failed to uphold Petitioner's Fourth Amendment rights against unreasonable searches by allowing the marijuana to be used as evidence against him, resulting in his present criminal conviction.

On the twelfth of January, 1969, Lieutenant Paul R. Smith, a uniformed municipal police officer of Eau Gallie, Florida, was on routine patrol in an unmarked car when he encountered Petitioner James E. Gustafson driving south through the town at about 2:00 A.M. in the morning, [Petitioner's App. 49-50,53]. Lieutenant Smith fell in behind a 1953 white Cadillac, occupied by two white males, which was weaving across the center line and back to the right side of the road, [Petitioner's App. 50]. Lieutenant Smith observed

the car to weave in this manner about four times, [Petitioner's App. 50]. The Eau Gallie police officer then observed the two occupants of the Cadillac to look back, spot the officer, and attempt to evade the officer by driving across US 1 and behind a Winn Dixie Store and to head south on another city street, [Petitioner's App. 50]. Petitioner James Gustafson was the driver of that automobile, [Petitioner's App. 51].

Lieutenant Smith then turned on his flashing light and "pulled them over," and requested Petitioner Gustafson's driver's license, [Petitioner's App. 51,66]. Petitioner responded that he did not have his driver's license with him, that he had left it at home in an adjoining city, [Petitioner's App. 51, 65]. At that time Lieutenant Smith placed Gustafson under arrest for driving without possession of a driver's license, placed Petitioner by the patrol car and searched him, and placed him inside the car for transport to the city jail, [Petitioner's App. 51,63-64].

In searching Gustafson the police officer found and removed a little "long chain," and he removed a Benson and Hedges cigarette box from Petitioner Gustafson's left, outside coat pocket. Lieutenant Smith opened the cigarette box and observed marijuana cigarettes inside. [Petitioner's App. 51].

Lieutenant Paul Smith was questioned at the pre-trial hearing on Petitioner

Gustafson's motion to suppress, concerning the officer's intent when he stopped Gustafson's white Cadillac:

"Q Did you pull them over because of the weaving?

A Yes, sir.

Q And it was your intention to arrest the driver for some driving violation?

A No, sir, it was my intention to find out why he had been driving that way, if he had been drinking or something.

Q I see. When Mr. Gustafson got out of the car did you detect an odor of alcohol about his person?

A No, sir.

Q Was there anything in his mannerisms that suggested he was intoxicated?

A He appeared to me to be intoxicated by his actions and the bleeriness of his eyes.

Q You detected no odor of alcohol?

A No, sir."

Petitioner's App. 57-58

Lieutenant Smith also confirmed that he wrote eight to ten traffic citations per week, and that maybe three or four out of every ten persons arrested by him for the offense of driving without a license were taken into custody to the police station, [Petitioner's App. 60]. He also testified that he always searched a suspect before placing him into the patrol car, [Petitioner's App. 63,66].

The citation given by Lieutanant Smith to Gustafson, for the offense of driving without a driver's license in his possession, was also introduced in evidence at the pre-trial hearing, [Petitioner's App. 51-52].

Based on the foregoing facts presented to the state trial court at the pre-trial hearing on Gustafson's motion to suppress, the trial judge admitted the marijuana into evidence, and Gustafson's conviction resulted. On direct criminal appeal to the Fourth District Court of Appeal, State of Florida, the appeals court reversed Gustafson's conviction. The state appellate court in its opinion extensively surveyed the authorities on "evidence" searches incident to arrest -- relying on the same numerous authorities given in Petitioner's arguments now to this court -- and determined there was no "nexus" between the search yielding the marijuana on Gustafson's person and the offense for

which he properly was under arrest. The appeals court also rejected the search in this case as a "protective" search, saying:

> "When the officer determined to arrest appellant and to place him in the squad car to be taken to the police station, he had a right to conduct a custodial search of appellant's person for his own protection and to prevent escape. An officer cannot be expected to place a suspect in the rear seat of his squad car without first searching him for weapons which might be used against him en route to the station house.
>
> The custodial search is limited to weapons and instrumentalities for escape. In the instant case the officer removed a cigarette package from appellant's coat pocket and inspected the contents. Surely he did not expect to find a dangerous weapon inside the small, light cigarette package. We do not require the arresting officer to close his eyes to evidence of other crimes which he may discover in the course of the search, but we do require the officer to limit the scope of his search to one for weapons

> or instrumentalities of escape. The only reasonable conclusion to be drawn from the officer's conduct is that he was searching for something other than a weapon, and under these circumstances such a general search is unwarranted and unlawful."
>
> Gustafson v. State, 243 So.2d 615, 625 (4 DCA Fla.1971).

The State of Florida successfully obtained certiorari review of the Fourth District Court of Appeal decision by the Florida Supreme Court. The Florida Supreme Court reversed the Fourth District. The Florida Supreme Court held basically that there was a reasonable suspicion that Gustafson was driving while intoxicated, consequently a search for the intoxicant at a time when Gustafson was lawfully under arrest was "reasonable" under Fourth Amendment standards; and the Florida Supreme Court rejected outright the Fourth District's "nexus" requirement for searches of the person. State v. Gustafson, 258 So.2d 1 (Fla.S.Ct.1972).

The United States Supreme Court now may decide whether Lieutenant Paul Smith's search and seizure of the marijuana cigarettes on James Gustafson's person was accomplished within the intent of the "reasonableness" standard of the Fourth Amendment.

SUMMARY OF ARGUMENT

Evidence obtained pursuant to a search of Petitioner Gustafson, after his being stopped about 2 A.M. for weaving his automobile across the center line four times and after his subsequently being arrested for driving without a license, was constitutionally reasonable in scope and purpose.

A municipal police officer stopped the Petitioner's car to determine "why he had been driving that way, if he had been drinking or something," and observed that, although Petitioner was bleary-eyed and acted intoxicated, he did not smell of alcohol. Upon arresting Petitioner for driving without a license, the officer searched Petitioner and removed from his person a little "long chain," and a Benson and Hedges cigarette box which the officer opened and observed marijuana cigarettes inside.

This search was constitutionally reasonable (A) as a routine, necessary protective search pursuant to the arrest; and (B) because supported by probable cause for an evidence search independent of the crime for which Petitioner was actually arrested.

(A) A police officer has the right to protect himself and prevent the possible escape of an arrestee, by searching the arrestee before transporting him to jail in the officer's police

cruiser.

That Petitioner in this case had taken evasive driving actions when he noticed the uniformed officer following him in an unmarked car, was merely one reminder that apprehended persons are often less than cooperative.

A search of a person for weapons pursuant to a valid arrest is an unquestioned right to self-protection of an arresting officer. A cigarette box is not too small to contain some harmful weapon (a razor blade or knife come readily to mind) with which an arrested criminal suspect could injure an officer or affect an escape. Indeed, the small "long chain" also removed from Petitioner was a potential weapon smaller than a cigarette box.

(B) The officer had probable cause to stop and to arrest Petitioner for driving under the influence of some intoxicant. That the officer chose to arrest Petitioner initially for driving without a license does not alter the fact that the officer also had sufficient probable cause to arrest Petitioner for driving while intoxicated.

An officer may search, pursuant to a valid arrest, for evidence of the crime. The officer in this case could have arrested Petitioner specifically for driving while intoxicated and searched him for drugs pursuant to that arrest,

without question.

The State of Florida maintains that an evidence search of a person legally arrested logically extends to evidence of any other crime for which the officer also has probable cause for arrest.

ARGUMENT

The Fourth Amendment to the United States Constitution strictly limits the power of law enforcement officers to make searches in the process of investigating crimes and enforcing laws. In the present case a law officer arrested James Gustafson on a traffic offense unrelated to drugs, and upon taking him into custody searched his person, which search included removing a cigarette box from his coat pocket and examining inside that box. Inside the box was found an illegal drug, marijuana. James Gustafson's present criminal conviction is for possession of that drug. The single question before the United States Supreme Court is whether the search that yielded the illegal drug comports with limits imposed by the Fourth Amendment.

Petitioner James Gustafson contends that the Fourth Amendment prohibits as unreasonable in purpose and scope the "extensive evidence search" of a person arrested for a minor traffic offense. The State of Florida responds that the search that occurred here was constitutionally sound as a "reasonable," routine protective search incident to the fact of arrest, regardless of the grounds for an arrest; and that it was also "reasonable" under Fourth Amendment standards in that it was supported by probable cause for an evidence search independent of the crime for which

Petitioner Gustafson was placed under arrest.

I. PROTECTIVE SEARCH

The Eau Gallie municipal police officer's search of James Gustafson was entirely proper as a routine protective search incident to the custodial arrest of James Gustafson. It is uncontested by Petitioner Gustafson that the arrest in this case was a valid custodial arrest.

> "In the present case we have . . . conceded the authority to the police officer to temporarily detain and question the petitioner and the legality of his decision to take the petitioner into custody."
>
> Brief of Petitioner, at (emphasis added)

The State of Florida agrees with Petitioner Gustafson where he says,

> "The central issue in this case concerns the question of 'reasonableness' of the police officer's activities in light of his decision to arrest and take the petitioner into custody."
>
> Brief of Petitioner, at

In resolving that issue, however, one

cannot look simply to the crime for which the accused is arrested -- as Petitioner Gustafson suggests. First, an arrest by any other name is still an arrest. It is total, physical custody by force or threat of force, and it occurs without -- or regardless of -- the arrestee's consent. Second, the question whether an officer should anticipate an individual to resist, by force, the imposition of a routine traffic "stop," is totally distinguishable from the question whether an officer reasonably should take precautions against that same individual resisting, by force, a custodial arrest on the same traffic charge, or against his subsequently attempting an escape. It is not the charging of a crime that the arrestee is expected to resist; it is the fact of his custody by the law officer.

The State of Florida agrees with Petitioner Gustafson that there are no fruits or instrumentalities of the offense for which Gustafson was arrested that the officer would have been warranted in searching for.[1] However, since further detention of Gustafson was contemplated, there was a need to search for weapons and other means of possible escape from custody. It is

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1 See: People v. Gonzales, 356 Mich. 247 97 N.W. 2d (1959)

this latter fact that Petitioner Gustafson fails to acknowledge in his arguments to this Court.

The State of Florida submits that a comprehensive weapons search incident to a valid custodial arrest is always "reasonable" under Fourth Amendment standards, regardless of any lack of "nexus" between the crime charged and the search. The nexus for the comprehensive weapons search is the fact of a custodial arrest, not the nature of the offense leading to the arrest. Either the law enforcement officer does have a right to perfect and secure a complete custodial arrest, or he does not.

The right to search a person incident to arrest is fundamental.

> "It is unreasonable searches that are prohibited by the Fourth Amendment. Carroll v. United States, 267 US 132, 147, 69 L ed 543, 548, 45 S Ct 280, 39 ALR 790. It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required. The right of the "people to be secure in their persons" was certainly of as much concern to the framers of the Constitution as the property of the person. Yet no one questions

> the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. Weeks v. United States, 232 US 383, 392, 58 L ed 652, 655, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177. Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him."
>
> United States v. Rabinowitz, 339 U.S. 56,60.

The authority for, and constitutional propriety of, a complete search of a person arrested is clear.

> "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. Weeks v. United States, 232 US 383, 392 58 L ed 652, 655, 34 S Ct 341, LRA1915B 834 (1914); Agnello v. United States, 269 US 20, 30, 70 L ed 145, 148, 46 S Ct 4, 51 ALR 409 (1925)."
>
> Preston v. United States, 376 U.S. 364, 367.

Since it is well recognized that it is constitutionally proper to search a person, upon his custodial arrest, for protective reasons, the State of Florida maintains that the instant search was a reasonable one within the scope of a protective search. Regardless whether "probable cause" existed for the Eau Gallie police officer to search James Gustafson for the instruments or fruits of any crime, the officer was authorized to search Gustafson's person for weapons and other instruments which the arrestee might use to effectuate his escape, as incidental always to the fact of a custodial arrest having occurred.

The officer was obviously justified in searching the cigarette box found on Gustafson's person in an effort to find concealed small weapons such as a razor blade, pen, pencil, or penknife; and he was justified in searching for other instrumentalities of escape such as a handcuff key or key substitute.

A majority of courts have viewed the fact of lawful arrest alone as sufficient to satisfy any reasonableness standard.[2] The "facts of life"

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2 Comment, Searches of the Person Incidental to Lawful Arrest, 69 Colum. L. Rev. 866, (1969); e.g., Hanks v. State, 195 So.2d 49 (3 DCA Fla.1967).

for law officers in Florida, sustain the majority view:

> "A total of 3,231 assaults on county and municipal law enforcement officers in Florida were reported during the year 1972 . . . 2,823 assaults reported for the year 1971."
>
> CRIME IN FLORIDA, State of Florida Department of Law Enforcement 1972 Annual Report, at 72.

Traffic pursuits and stops gave rise to 463 of those assaults on Florida law officers in 1972. Id., 73.

A breakdown of the 1972 Florida assaults on police officers shows 234 assaults by firearm, 89 by knife or cutting instruments, 373 by "other dangerous weapons," and 2,127 by hands, fists, feet, etc. Id., 75.

An informative discussion of search of the person incidental to his arrest is presented in: Comment, Searches of the Person Incidental to Lawful Arrest, Colum.L.Rev. 866 (1969).* That law

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* See also: Case Comment, Criminal Law: Personal Searches Incident to Traffic Arrest -- No Nexus Necessary?, 25 U.Fla.L.Rev. 239 (1972)

review article discusses specifically the propriety of searches incident to traffic arrests, Id., 871-875, and the article seeks to criticize adversely the suggestion that a traffic arrest renders a weapons search -- not to be confused with an evidentiary search -- to be ipso facto reasonable.

> "A protective search for weapons should be justified by an arrest alone only to the extent that the arrest creates a reasonable suspicion that the suspect is armed and dangerous. The mere arrest for a traffic violation would not appear to create such a reasonable belief. It follows that if a protective search is justified at the time of arrest for a traffic violation, it is because of circumstances other than the arrest."
>
> Id., at 874

This argument overlooks the distinction between the common, non-custodial traffic "stop", and the the less common custodial arrest for a traffic offense, such as occurred in this case. The argument also overlooks 463 battered Florida law officers as result of traffic pursuits and stops in 1972.

Petitioner Gustafson suggests that the Eau Gallie police officer could not "reasonably" have searched Gustafson's

person because there was a total absence of any indication that the officer, in arresting Gustafson, was dealing with an armed and dangerous individual. Gustafson's suggestion is valid, and should be adopted by the Court, only if this Court also can guarantee to law officers that a criminal-accused in police custody will give some indication, some forewarning, of uncooperativeness before assaulting a police officer. Absent a judicial determination that such forewarnings visibly occur as a matter of course, there is no reasonable basis for denying law enforcement officers the power to make their arrests complete and secure from the first moment of detention. It is totally inconsistant on Gustafson's part to concede, on the one hand, that he was lawfully placed under custodial arrest by the Eau Gallie municipal police officer, yet to contend, on the other hand, that the officer could not also take precautions to effectuate and secure that custodial arrest.

In a nation such as the United States where personal violence is a traditional and common solution to problems, it would border on the ridiculous to deny police officers complete authority to perfect and secure a custodial arrest, while at the same time requiring or even expecting those officers to place their own lives "on the line" in order to attempt such arrests. The Eau Gallie

police officer's search of James Gustafson was reasonable both in purpose and in scope. Indeed, it was more than simply "reasonable," it was "necessary" as required by a commonsense understanding of the potential threat of violence to any law officer whenever he takes an accused into complete physical custody for transportation to jail, regardless of the nature of the charges.

Neither are violations of traffic ordinances of such insignificant criminal nature as Petitioner Gustafson would have this Court believe. For many people the potential loss of their driver's license -- vital to their livelihood -- is more to be feared than a fine or short term of imprisonment. And, is it not also true that far more American citizens are killed and maimed as the result of driver ordinance violations (i.e., driving while intoxicated, speeding, etc.) than are killed or injured by all other crimes combined?

Petitioner Gustafson contends that this Court's decisions in Terry v. Ohio, 392 U.S. 1 (1968), and Sibron v. New York, 392 U.S. 40 (1968), prohibited the search that occurred in this case. Terry dealt with the propriety of searching three men on foot who appeared to be "casing" a store in Cleveland, Ohio; and Sibron dealt with the validity of New York's "stop-and-frisk" law and the search of Sibron upon being called

by a law officer onto the street from inside a restaurant. Both Terry and Sibron dealt with street confrontations between officers and pedestrians; neither dealt with a traffic arrest; and neither dealt with searches conducted immediately after and incident to an arrest. The fundamental distinction between the Terry and Sibron cases and the present case is that Terry and Sibron are a judicial delineation of standards for searches, where police officers need to search for weapons in situations lacking probable cause to arrest for crime. The searches in Terry and Sibron preceded the arrests. However, the present case raises an issue of the constitutional propriety of searching Gustafson immediately after, and pursuant to, a valid arrest.

Petitioner Gustafson in his arguments fails to acknowledge the fundamental differences between a constitutionally valid search incident to a "stop-and-frisk" encounter and a constitutionally proper search incident to taking an arrestee into custody.

A valid custodial arrest ipso facto renders permissible a search for weapons.[3]

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3 Parnell v. State (3 DCA Fla.1967) 204 So.2d 910; United States v. Rabinowitz, 339 U.S. 56 (1950); Preston v. United States, 376 U.S. 364 (1964).

The holdings in Terry and Sibron, (that in the case of a self-protective search for weapons the officer must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous), has no bearing on a search conducted incidental to a valid custodial arrest.

Gustafson argues that this Court's opinion in Chimel v. California, 395 U.S. 752 (1969), changed the traditional rule on searches incident to an arrest. He suggests that in Chimel emphasis was placed upon the critical language of Terry saying that, ". . . [t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible . . ." 395 U.S. at 762; Brief of Petitioner, at . Petitioner Gustafson misconstrues the opinion in Chimel. The Chimel pronouncement dealt solely with the reasonableness of a search of the "place" where an accused is arrested. The Chimel opinion nowhere intimates that a weapons search of the "person" of the arrestee is not, ipso facto, reasonable. Indeed, the Chimel opinion specifically recognizes the continued validity of searching the "person" of an arrestee incidental to his arrest, wherein the opinion acknowledged again that,

> "When an arrest is made, it is reasonable for the arresting officer to search the person

> arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated."
>
> Chimel v. California, 395 U.S. 752, 762-763.

Petitioner Gustafson erroneously relies on Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir.1968), as Federal authority for a "nexus" argument. Petitioner fails to acknowledge that Amador-Gonzalez dealt with the search of a "place," not of a person, incident to his arrest. Amador-Gonzalez concerned the propriety of searching the accused's automobile incidental to a "pretext" traffic arrest. In ruling the search in that case to have been improper, the Fifth Circuit Court of Appeals specifically reaffirmed the ". . . well-recognized exception that as an incident to arrest, either with or without a warrant, the arresting officers may search the person arrested and his immediate surroundings." 391 F.2d 308, 313, 314.[4]

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[4] See also: Williams v. United States, 412 F.2d 729 (5th Cir.1969); Jack v. United States, 387 F.2d 471 (9th Cir. 1967), cert.den., 392 U.S.934 (1968).

It is significant to note that, with the exceptions of Terry and Sibron which dealt with pre-arrest searches of the person in a "stop-and-frisk" situation, every one of the United States Supreme Court opinions relied upon in Gustafson's arguments are cases which dealt solely with searches of a "place" in conjunction with an arrest. None dealt with the constitutional propriety of searching the "person" arrested, incident to his custodial arrest. This is true of Weeks v. United States, 232 U.S. 383 (1914), [search of the accused's house some distance from the arrest]; Carroll v. United States, 267 U.S. 132 (1925), [search of the arrestee's home some distance from place of arrest]; Marron v. United States, 275 U.S. 192 (1927), [search of premises where liquor was unlawfully manufactured and consumed]; Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), [search of offices of persons lawfully arrested]; United States v. Lefkowitz, 285 U.S. 452 (1932), [search of desk drawers and a cabinet incident to nearby lawful arrest]; Harris v. United States, 331 U.S. 145 (1947), [search of entire four-room apartment incident to arrest of occupant therein]; Trupiano v. United States, 334 U.S. 699 (1948), [seizure of illicit distillery incidental to arrest of operator]; United States v. Rabinowitz, 339 U.S. 56 (1950), [search of one-room office incident to valid arrest]; and Chimel v. California, 395

U.S. 752 (1969), [search of entire house incident to proper arrest, but without a search warrant].

Petitioner Gustafson seeks to establish something totally new in the law: something less than a custodial arrest but more than a "stop-and-frisk." He proposes a custodial arrest without precautionary steps to secure the arrest, yet does not propose a system whereby law officers can reasonably foretell when a traffic arrest that is custodial in nature will be resisted, or an escape attempted, by force against the officer.

It would appear far more sensible to tell a law enforcement officer that in a given situation he may not perform a custodial arrest, rather than to tell the officer he may arrest a person but must refrain from a protective search of the party arrested. The United States Supreme Court, in this case, should instruct the law enforcement officers in this country:

> You may, as an incident to any valid custodial arrest, make a warrantless search of the arrested person. Your search of his person must be performed at the time of or immediately after his arrest, unless there are very compelling circumstances for a temporary delay of the search. You may

> search for weapons and instruments of escape, and for fruits or instruments of the particular crime for which you have arrested the person. Your "incidental" search of the person is limited to the scope reasonably necessary to comply with these purposes.

The facts of the present case show full adherence to the foregoing standard. The Eau Gallie police officer in good faith routinely searched James Gustafson's person incident to Gustafson's custodial arrest, and the officer's search was clearly within the scope and intensity of a necessary and routine protective search for weapons large and small.

Even if the "nexus" argument urged by Petitioner were to be held applicable to protective searches, the search of Gustafson was proper. A reasonable suspicion, that a protective search of Gustafson was necessary, was justified by the lateness of the hour (two o'clock in the morning) and by the fact that the two occupants of the white Cadillac, upon turning around in their seats and discovering the presence of a uniformed officer in the unmarked car on the road behind them, immediately took evasive driving actions. So, by the time the officer had arrested Gustafson, he knew that Gustafson already had demonstrated a lack of interest in cooperating with the law enforcement personnel. Our law must recognize the reasonableness

of an officer's responding with considerable caution to such early morning conduct by a person being arrested. The police officer's own life is the potential cost for his inattention to such overt indications of a desire to avoid contact with a law enforcement officer.

II. EVIDENCE SEARCH

The Eau Gallie municipal police officer in this case had a lawful and uncontested right to arrest James Gustafson for driving without possession of his driver's license. The city policeman also had, however, probable cause to arrest James Gustafson for the additional crime of driving while intoxicated, and the incidental right upon such arrest to search Gustafson's person for the intoxicating instrumentality of that offense. That the officer did not choose to charge this additional criminal violation when he arrested Gustafson on a separate offense, does not alter the fact that he was authorized to do so, or that he did have the concurrent probable cause to search.

The following facts, developed in the pre-trial evidentiary hearing on Gustafson's motion to suppress, established probable cause for an arrest and incidental search of Gustafson on a charge of driving while intoxicated. In fact, they established probable cause to search the lawfully arrested Gustafson specifically for drugs.

First, the police officer had observed Gustafson to weave across the center line and back, four times. Second, the officer's express reason for stopping Gustafson's vehicle was, "to find out why he had been driving that way, if

he had been drinking or something." Third, the officer saw Gustafson and his companion take evasive steps as soon as they noticed the officer's presence. Fourth, the officer judged, from Gustafson's actions and the bleariness of his eyes when he was apprehended, that Gustafson was in fact intoxicated. Finally, when the officer approached Gustafson he could detect no odor of alcohol.

The weaving and the bleary eyes established probable cause to believe Gustafson to have been intoxicated. The absence of an alcoholic smell established probable cause to believe he was intoxicated on a substance other than alcohol; to wit: drugs, lawful or otherwise. And, the evasive actions taken by Gustafson when a police officer's presence was discovered established an intent by Gustafson to prevent the law enforcement officer from discovering some fact or some item.

In Florida it is a criminal offense to drive while intoxicated, regardless of whether the intoxicant be alcoholic drink, unlawful drugs, prescription drugs, or non-prescription drug-store cure-alls; cf., Florida Statutes §317.201, (In recognition of the fact that a drunk driver is just as deadly a roadway menace when drunk on a doctor's medicine as on alcohol or illegal drugs). And, as conceded in

Petitioner's own survey of applicable law, a police officer does have authority to search incidental to a custodial traffic arrest, to the extent of searching for the instrumentalities or fruits of the crime for which the arrest itself is made.[5] The officer in this case could have arrested Gustafson specifically for driving while intoxicated, and searched for one instrumentality of that offense, drugs.

The State of Florida suggests that where a party is lawfully arrested on one criminal charge, and at that moment there exists "probable cause" for an arrest and incidental search on yet another charge, it is prima facie reasonable for the arresting officer to search the person in his custody for the instrumentalities and fruits of that other charge, without the necessity of arresting the party also on grounds of the additional crime. Such a rule benefits the accused.

So long as the "probable cause" requirement is included as to both crimes, there is no basis for claiming that this rule opens any doors for "pretext" arrests and bad faith searches by law

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5 Chimel v. California, 395 U.S. 752 (1969); State v. Gustafson, 258 So. 2d 1, 3 (Fla.S.Ct.1972) at N. 4.

officers.

The State of Florida would also suggest that where there exists even a "reasonable suspicion" that a person lawfully under arrest has on his person evidence of another crime, the arresting officer at the time of arrest may search for that evidence. If the United States Supreme Court in Terry and Sibron was willing to acknowledge the reasonableness of searching free citizens for weapons on something less than probable cause, then it also should be willing to acknowledge the reasonableness of searching persons in lawful custody, on something less than probable cause for an arrest and search on additional charges.

The Florida Supreme Court's observations on this point make good sense:

> "A reasonable suspicion (which was present here) that the driver was intoxicated not only justified stopping the vehicle, but also justified searching for intoxicants or drugs, inasmuch as our statute makes the influence of either an offense. In today's proliferation of illegal drug use which affects the faculties, checking only for liquors is no longer adequate. The new and devastating use of

> various drugs in myriad forms (unhappily by drivers in dangerous instrumentalities) imposes the further duty upon the alert police officer to examine as well for such drugs in their various forms. Statistics are now reporting that 1 in 5 fatal traffic accidents involve the use of intoxicants or drugs. Finding the marijuana cigarettes in the natural place of a cigarette package is no different than finding liquor in a liquor bottle. It is no less a proper search and seizure."
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> State v. Gustafson, 258 So.2d 1, 2 (Fla.S.Ct.1972) (footnote omitted)

Regardless of whether this Court recognizes one or both of these standards, the Court also should consider the "exigent circumstances" necessitating a warrantless search for drugs on the person of the lawfully arrested Gustafson. Drugs concealed on the person are always subject to immediate destruction, by personal consumption or otherwise. Consequently, the existence of "probable cause" to believe the drugs were on his person warranted an immediate search to secure that evidence.

The opinion of the Florida Supreme Court which is here on certiorari review gave extensive attention to the facts

which made the Eau Gallie lawman's search of Gustafson a "reasonable" evidence search -- aside from the question of the search's propriety as a protective measure. That same "reasonableness" standard should be affirmed now by the United States Supreme Court.

In construing the Fourth Amendment's reasonableness requirement as applicable to the facts of this case, the United States Supreme Court must acknowledge the needs of law enforcement and of police policies reasonably necessary to meet those needs. Only in that context can the Court fairly analyze the individual citizen's rights under the Fourth Amendment.

> "This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . . .' Gouled v. United States, 255 U.S. 298, 304, 65 L.Ed.647, 650, 41 S.Ct.261 (1921).
>
> This Court has also pointed out that it is only unreasonable

> searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and circumstances.' Go-Bart Importing Co. v. United States, 288 U.S. 344, 357, 75 L.Ed. 374, 382, 51 S.Ct.153 (1931).
>
> The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states."
>
> Harris v. United States, 331 U.S. 145, 150-151. (footnotes omitted)

The instant case is clearly distinguishable from the case of U.S. v. Robinson, 471 F.2d 1082 (D.C.Cir.1972), cert. granted, 93 S.Ct.1500 (1973) (No. 72-396, 1972 term), wherein the officer had no reason to think the arrestee was guilty of more than driving with an improper license; whereas, in the instant case, the officer reasonably suspected that the arrestee was driving while

intoxicated. Unlike the Robinson case, the search of Gustafson was well within any scope-limitation principle, since the officer stopped Gustafson for weaving while driving and after stopping him observed that Gustafson appeared bleary-eyed but did not smell of alcohol. In examining this case ". . . on its own facts and circumstances . . ." it becomes obvious that it was a reasonable search that led to discovery of the drugs on Petitioner James Gustafson's person and resulted in his criminal conviction. The rights of the citizen in a free society are not challenged by a search such as occurred in this case.

CONCLUSION

WHEREFORE the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent has been furnished to Honorable Michael F. Cycmanick and Honorable James M. Russ at Law Offices of James M. Russ, 441 First Federal Building, Orlando, Florida 32801, by mail this day of June, 1973.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-1669

JAMES E. GUSTAFSON, *Petitioner*,

vs.

STATE OF FLORIDA, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Florida

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No. 72-936

UNITED STATES OF AMERICA, *Petitioner*,

vs.

WILLIE ROBINSON, JR., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT IN NO. 71-1669 AND PETITIONER IN NO. 72-936

INTERESTS OF AMICUS CURIAE

The question presented in the instant cases relates to the permissible scope of a search incident to a

lawful arrest of a traffic law violator for an offense which is serious enough to require a police officer to take the arrestee into custody.[1]

We are vitally interested in the cases for several reasons:

First, we seek a result which will permit a full field search[2] for weapons to ensure the safety of police officers in cases wherein a motorist has been arrested for a traffic offense of sufficient seriousness to require that he be taken into custody. We are particularly concerned about this issue inasmuch as our own Supreme Court has recently curtailed the right of a police officer to conduct even a pat-search in such circumstances unless he can articulate specific facts to support a reasonable belief that the motorist is armed. *People v. Superior Court (Simon)*, 7 Cal. 3d 186, 206 n. 13, 101 Cal.Rptr. 837, 852 n. 13 (1972).

Second, these cases which "are set for oral argument in tandem", also afford this Court an opportunity to re-examine and perhaps re-define the scope

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[1]Not at issue here is a traffic *stop* involving routine traffic infractions for which the officer may only issue a citation. Neither is this a case involving a traffic *detention* for a traffic offense of intermediate seriousness for which the officer may either issue a citation or, if the circumstances warrant, take the violator into custody. Rather, the issue here presented relates exclusively to serious violations of the traffic laws where the *full custody arrest* of the offender is mandatory.

[2]A full field search consists of the following: (1) an initial pat-search for weapons, (2) a thorough search of all pockets and containers wherein weaponlike or even equivocal feeling objects are disclosed or might be concealed. Such a search is a lesser intrusion than the full body search or strip search conducted at a jail prior to confinement therein. See Findings of District Judge Jones in Appendix B, p. 82a of the Petition for Writ of Certiorari in No. 72-936.

of the Exclusionary Rule in both state and federal cases. We do not urge that the Exclusionary Rule be totally abandoned until some meaningful alternative can be developed. Rather, we have accepted the invitation of the Chief Justice to "consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced." *Bivens v. Six Unknown Agents,* 403 U.S. 388, 420-423 (Burger, C. J. dissenting).

Specifically, we urge the Court to adopt a balancing test in lieu of the *per se* rule of exclusion to determine whether evidence obtained in violation of the Fourth Amendment should be admitted or suppressed. The following factors are suggested as being relevant in such a balancing process:

(1) The objective nature and scope of the intrusion. *E.g.,* a technical trespass as opposed to a wholesale exploratory invasion.

(2) The subjective state of mind of the searching officer. *E.g.,* an honest mistake in judgment as opposed to a willful, deliberate, bad faith action.

(3) The public interest in conducting the search, including, for example, the relative gravity of the crime under investigation.

ARGUMENT

I

WHEN A MOTORIST IS ARRESTED FOR A TRAFFIC OFFENSE THAT IS SERIOUS ENOUGH TO REQUIRE HIS BEING TAKEN INTO CUSTODY, THE OFFICER SHOULD BE PERMITTED TO CONDUCT A FULL FIELD-SEARCH FOR WEAPONS FOR HIS OWN PROTECTION.

The risks to the personal safety of police officers inherent in traffic offense encounters is well documented and has been judicially recognized. *E.g., Adams v. Williams,* 407 U.S. 143, 148 (1972). "[E]ven a minor traffic citation incident can occasionally erupt into violence." *People v. Superior Court (Kiefer),* 3 Cal.3d 807, 829, 91 Cal.Rptr. 729, 743 (1970). The danger to the police officer is increased when a traffic law violator is to be taken into custody and transported in a police vehicle. "The critical factor . . . is not the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer *if* in fact the person is armed." *People v. Superior Court (Simon),* 7 Cal.3d 186, 214, 101 Cal.Rptr. 837, 857 (1972) (Wright, C.J., concurring).

Therefore, we join with the United States and the State of Florida in urging this Court to authorize full-field searches for weapons in those cases involving lawful arrests for serious traffic offenses when the motorist must be taken into custody.

Such a rule would not create too broad an exception to the general rule that searches be justified by articulation of *specific facts.* Although statistics are not available, it seems fair to assume that full custody

arrests for serious traffic offenses constitute only a small fraction of the millions of routine traffic citation encounters. In this limited category of cases, it would not be an intolerable and unreasonable intrusion into the privacy of the vast majority of peacable citizens who travel by automobile, to permit a full-field search for weapons, not on specific facts, but on the *inherent fact* that there is a significant increase in the danger to the officer in such cases. *Ibid.*[3]

Prior to the California Supreme Court decision in *Simon, supra,* several California intermediate appellate courts had upheld the right of an officer to search for weapons when a motorist was being taken into custody for a serious traffic offense or upon an outstanding traffic warrant for failure to respond to a prior citation. See, *People v. Graves,* 263 Cal.App. 2d 719, 734-735, 70 Cal.Rptr. 509 (1968); *People v. Weitzer,* 269 Cal.App.2d 274, 289-294, 75 Cal.Rptr. 318 (1969); *Morel v. Superior Court,* 10 Cal.App.3d 913, 917-918, 89 Cal.Rptr. 297; *also see People v. Rhodes,* 23 Cal.App.3d 257, 261-265, 100 Cal.Rptr. 487 (1972) [cases summarized in concurring opinion].

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[3]It may be observed, however, that the record in No. 72-936 does reveal the articulation of specific facts to support a field search. The arresting officer had knowledge that various small weapons could be concealed on a suspect and recalled that a fellow officer had been recently injured after he failed to uncover a hidden razor blade. See findings of District Judge Jones in Appendix B, p. 81a of the Petition for Certiorari in No. 72-936. In addition, the officer was directed by his department to conduct a field search incident to a custodial arrest. This directive represented the collective judgment of the department regarding the risks inherent in custodial arrests. This collective knowledge may properly be imputed to the arresting officer. *E.g., United States v. Caniesso,* 470 F.2d 1224, 1230 n. 7 (2nd Cir. 1972) and cases there cited.

In the above cases, the balance between the interest of society in protecting its police officers and the interest of society in preventing intrusions into privacy was struck in favor of the protective interest in custodial traffic arrest cases. For example, the court in *Graves* and *Weitzer* approved at least a pat-search, but left open the question of a more thorough examination of the pockets if ambiguous feeling objects were disclosed. However, the *Weitzer* court did observe that "a rule which requires identification of a weapon to a certainty from a pat-search might fall short of protecting the officer from subsequent assault." *People v. Weitzer, supra,* 269 Cal.App.2d at 291, 75 Cal.Rptr. at 329.[4]

In *Morel* and the *Rhodes* concurrence, the courts answered the question left open in *Weitzer* and held a full field search to be reasonable to ensure an officer's safety from assault by a suspect carrying a small weapon which would not necessarily be disclosed by a pat-down. *Morel v. Superior Court, supra; People v. Rhodes, supra.*[5] Interestingly, the New Jersey Supreme Court has unanimously reached the same

[4]The California Supreme Court subsequently indicated that precisely such certainty of identification was required. *People v. Collins,* 1 Cal.3d 658, 662-663, 83 Cal.Rptr. 179 (1970). However, *Collins* did not purport to apply to custodial arrests, but only to investigatory detentions as in *Terry v. Ohio,* 392 U.S. 1 (1968). Neither may *Sibron v. New York,* 392 U.S. 40 (1968), be equated to the instant case. There, the police were looking for narcotics, not weapons, and the search was not incident to arrest.

[5]*Morel* and *Rhodes* also suggest an alternative rationale for upholding pre-custody field searches, namely, the prevention of the disposing of contraband by the arrestee while he is being transported in the police vehicle. *Ibid., and see, People v. Peterson,* 9 Cal.App.3d 627, 630, 88 Cal.Rptr. 597, 598 (1970).

conclusion in an opinion which apparently has heretofore been totally overlooked. *State v. Campbell*, 250 A.2d 1, 5 (N.J. 1967). Without hesitation, it was held that a pat-search which disclosed an ambiguous object justified examination of the object to assure that it did not conceal a weapon. *Id.*

As previously noted, however, the California Supreme Court has recently disapproved the aforementioned line of intermediate appellate cases and curtailed the right to conduct protective searches in traffic arrest cases. Instead, it has prohibited even a pat-search unless the officer can articulate specific facts to support a reasonable belief that the motorist is armed. *People v. Superior Court (Simon)*, 7 Cal.3d 186, 206, 101 Cal.Rptr. 837, 852 (1972).[6]

It is California's position that the majority of the California Supreme Court has incorrectly weighted the balance too heavily against the public interest in ensuring the safety of its police officers. The instant cases afford California an opportunity to persuade the highest tribunal in the country to redraw that balance in favor of police safety, and approve field searches for weapons in custodial arrest cases. As previously indicated, such a ruling would not be an intolerable and unreasonable invasion of the privacy

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[6]In his concurring opinion in *Simon*, Chief Justice Wright interprets the majority decision as not precluding a pat-search when a motorist is taken into custody, as distinguished from merely being given a citation. 7 Cal.3d at 212-214, 101 Cal.Rptr. at 856-857. The majority does not, however, limit its holding to citation encounters. The same rule prohibiting a pat-search is also applied to custodial arrests upon an outstanding traffic warrant for failure to respond to a prior citation. 7 Cal.3d 206 at n. 13. 101 Cal.Rptr. 852 at n. 13.

of the vast majority of peacable citizens who travel by automobile, given the following factors: (1) the limited nature of the intrusion—a field or pocket search for weapons, not a strip search, (2) the limited application of the field search—only to custodial arrests for serious traffic offenses, (3) the increased likelihood of danger to the officer inherent in such custodial encounters and (4) the public interest in protecting its police officers from such danger.

II

THE EXCLUSIONARY RULE SHOULD BE MODIFIED TO REQUIRE APPLICATION OF A BALANCING TEST TO DETERMINE WHETHER EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT SHOULD BE SUPPRESSED OR ADMITTED.

The case against the Exclusionary Rule has been forcefully stated and developed at length in *Bivens v. Six Unknown Agents, supra* (Burger, C. J. concurring) and *Schneckloth v. Bustamonte,* 41 U.S.L.W. 4726, 4735-4743 (1973) (Powell, J. concurring). No purpose would be served by repeating here the many cited arguments and authorities supporting total or partial abandonment of the rule. Rather, we accept the obligation imposed upon those who would criticize existing institutions to present practical, reasonable alternatives thereto. The instant cases, one state and one federal, set to be argued in tandem, offer this Court a timely vehicle to consider proposed modifications of the Exclusionary Rule.

This Court applies a balancing test (governmental interest in searching v. nature and scope of the intrusion) in determining the threshold question of whether evidence has been obtained by means which violate the Fourth Amendment. *Terry v. Ohio,* 392 U.S. 1, 20 (1968). We urge that the Court adopt a similar balancing approach, in lieu of the present *per se* rule of exclusion, to determine the question of whether evidence so obtained should be admitted or suppressed.

With certain limited exceptions, *per se* rules have not been favored by this Court. *(E.g., Chapman v. California,* 386 U.S. 18 (1972); *Milton v. Wainwright,* 407 U.S. 371 (1972).) A *per se* rule of exclusion in search and seizure cases is, we submit, peculiarly inappropriate. As has been repeatedly observed, claims of unlawful search and seizure are distinct from many other constitutional claims, in that the evidence seized has ordinarily not been rendered unreliable by the means of its seizure. Thus, the claim bears absolutely no relation to the defendant's innocence. What must be sought, therefore, is a reconciliation between the contrasting public interests at stake. Chief Justice Weintraub of the New Jersey Supreme Court has aptly summarized these competing interests:

> "The first right of the individual is to be protected from attack. That is why we have government, as the preamble to the Federal Constitution plainly says. . . . The Bill of Rights was not intended to deny that primary mission. This is not to belittle the inestimable rights thus con-

secrated, but rather to say that those rights may not be read to defeat the very reason for government itself.

> "We must be mindful that the contest is not between the State and the individual. The contest is wholly between competing rights of the individual—the right to be protected from criminal attack and the several rights in the Amendments. When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, *Mapp* denies the innocent the protection due them." *State v. Bisaccia*, 58 N.J. 586, 590, 279 A.2d 675, 677 (1971).

We urge that a balancing test to determine whether exclusion is warranted better serves these competing interests, than does a *per se* rule which in effect imposes capital punishment upon evidence obtained by even the most inadvertent technical violation of the Fourth Amendment. We suggest that the following factors are appropriate to be weighed in such a balancing approach:

(1) The objective nature and scope of the intrusion.

(2) The subjective state of mind of the searching officer.

(3) The public interest in conducting the search, particularly with regard to the gravity of the crime under investigation.

The Exclusionary Rule was created to protect the privacy of the individual from certain specific conduct on the part of police officers. The conduct sought to be controlled in *Mapp* was described as "official lawlessness in flagrant abuse" of the right to privacy, "unconscionable invasions of privacy," and "utter disregard of the enforceable Fourth Amendment," *Mapp v. Ohio*, 367 U.S. 643, 655, 657, 658 (1961). The conduct in *Mapp* was precisely that. Three police officers arrived at Miss Mapp's residence pursuant to information that a person was hiding in the home who was wanted for questioning in connection with a recent bombing. The officers knocked on the door and demanded entrance, but Miss Mapp, after telephoning her attorney, refused to admit them without a search warrant. Three hours and four additional officers later, the officers forcibly opened the door when Miss Mapp did not respond immediately. Although Miss Mapp's attorney arrived, he was not permitted to see or enter the house. When Miss Mapp demanded to see a search warrant, a paper was held up by one of the officers which she grabbed and placed into her bosom. A struggle ensued in which the officers recovered the paper, handcuffed Miss Mapp because she had been belligerent, and twisted her hand, causing her to yell and plead with the officers.

The prohibited action in *Mapp* falls into two categories: *first*, the subjective factor of the officer's state of mind: deliberate, willful, and in bad faith; *second*, the objective factor of the nature and scope of the intrusion: flagrant, exploratory and substan-

tial. Thus, the activity to be deterred by the Exclusionary Rule is that which deliberately or substantially violates Fourth Amendment rights. To deter this conduct the Exclusionary Rule should be applied only in case of deliberate or substantial violation.

It is contrary to the reasons advanced for the Exclusionary Rule to apply it where the violation by the police officer is both a limited intrusion and an inadvertent, honest mistake in judgment. In order for the deterrence theory to have any validity, the police officer must be able to distinguish right from wrong. He must be able to perceive that conduct which he is to avoid. As was stated by Mr. Justice Traynor in delineating the Exclusionary Rule in *People v. Cahan, supra,* 44 Cal.2d at 448, 282 P.2d at 913: "Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a *choice* between securing evidence by legal rather than by illegal means, officers will be impelled to obey the laws themselves since not to do so will jeopardize their objectives." (Emphasis added.) This will be true only where the police officer knows that he has a choice, that is, only where he knows that his proposed activity would be in violation of Fourth Amendment rights.

Application of the Exclusionary Rule must be tempered with the realization that a police officer is not as well equipped as an appellate court justice to deal with legal subtleties. *See Brinegar v. United States,* 338 U.S. 160, 175 (1949). The police officer does not have the same education, training, or experience as

that of an appellate court justice, nor is the police officer in a position to devote as much time to making a legal determination.

As Judge Friendly has suggested, "It does not seem consistent with the objective of deterrence that the maximum penalty of exclusion should be forced for an error of judgment by a policeman, necessarily formed on the spot and without a set of the *United States Reports* in his hands, which is not apparent years later to several Justices of the Supreme Court." Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Calif. L. Rev. 929, 952 (1965).

Application of the Exclusionary Rule ought also to be adjusted according to the public interest in the search which is at stake in any particular case. Principally, we urge that one of the factors to be considered in the balance is the severity of the crime involved. Justice Cardozo's opinion in *People v. Defore* is often cited but there is significant language in the opinion of Justice Finch in the Appellate Division opinion:

> "To be unable to find a murderer guilty, although competent evidence is before the court to warrant a conviction, for the reason that someone else is guilty of petty larceny in connection with obtaining such evidence seems a handicap rather than a help to the administration of justice." *People v. Defore, supra,* 213 App.Div. 643, 652, 211 N.Y.S. 134, 142 (1925).

A distinguished member of this Court was similarly inclined:

". . . judicial exceptions . . . should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show proable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger. *Brinegar v. United States, supra,* 338 U.S. 160, 183 Jackson, J. dissenting).

Also see, People v. Sirhan, 7 Cal.3d 710, 739, 102 Cal. Rptr. 385, 404 (1972); *Dorman v. United States,* 435 F.2d 385, 392 (D.C. Cir. 1970); *People v. Curley,* 12 Cal.App.3d 732, 747, 90 Cal.Rptr. 783, 794 (1970).

The ethical quandary posed by the application of the Exclusionary Rule without regard to the nature of the crime involved is a significant one. "However much we may be revolted by the methods used by the police to obtain the evidence we cannot rationally say that the defendant whose crime may be at least equally revolting should have a personal right to go free as a result." The Exclusionary Rule assumes "that the policeman's action always involves a greater social evil than the defendant." Barrett, *Exclusion of*

Evidence Obtained by Illegal Searches, 43 Cal.L.Rev. 565, 581 (1955).

In this case, the crime does not involve violence nor is it an offense against the person. We would freely admit that the offense in this case would not be a factor requiring the relaxation of the Exclusionary Rule. Nevertheless, as has been discussed earlier in Argument I, there is in fact a compelling public interest for the search herein: ensuring the protection of police officers from a high risk of physical assault, which, like a serious crime of violence, calls into play the considerations articulated by Judge Finch, Justice Jackson and Professor Barrett.

CONCLUSION

It has never been adequately explained why a case like *Mapp*, which involved extremely flagrant deliberate police misconduct used for the prosecution of the most trivial offense necessarily requires the suppression of evidence seized with probable cause in good faith reliance upon a statutorily authorized warrant used for the prosecution of murder as in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Without that explanation, the rule should never have been extended to its present breadth.

We do not ask now for the overruling of *Mapp;* we ask that the Exclusionary Rule be limited to those cases like *Mapp* which caused the rule to be promulgated. The Exclusionary Rule has assumed a scope

far beyond the justifications offered when it was imposed upon the States. There is no valid rationale for its automatic extension to all classes of cases regardless of the nature of the police conduct and the gravity of the crime. As a minimum measure, the reach of the rule should be reduced to conform with the reasons offered for the rule in *Mapp*.

The People of the State of California as amicus curiae, respectfully urge the affirmance of the judgment below in No. 71-1669, the reversal of the judgment below in No. 72-936, the adoption of the suggested modifications of the rule in *Mapp v. Ohio*.

Dated, June 26, 1973.

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IN THE

Supreme Court of the United States

No. 72-936

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIE ROBINSON, JR.,

Respondent,

(On Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit)

No. 71-1669

JAMES E. GUSTAFSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

(On Writ of Certiorari to the Supreme Court of Florida)

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The State of Illinois has a substantial interest in the scope and application of the exclusionary rule. In particular the Supreme Court of Illinois has always followed applicable federal precedents in search and seizure cases. The cognate provisions of the Illinois Constitution are construed as identical in scope and effect as the provisions of the Fourth and Fifth Amendments of the United States Constitution. See *People* v. *Grod*, 385 Ill. 584, 53 N.E. 2d 591 (1944). Initially, the Supreme Court of Illinois refused to apply the exclusionary rule. See *Trask* v. *People*, 151 Ill. 523, 529 (1894). After the adoption of the exclusionary rule in federal courts, the Illinois rule was changed in reliance upon the opinions of this Court. See *People* v. *Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923); *People* v. *Castree*, 311 Ill., 392, 143 N.E. 112 (1924); *City of Chicago* v. *Lord*, 7 Ill. 2d 379, 130 N.E. 2d 505 (1955). It is therefore reasonable to assume that any change in the exclusionary rule made by this Court will affect directly the rules applied by the state courts.

THE RULE EXCLUDING EVIDENCE IMPROPERLY SEIZED SHOULD BE APPLIED ONLY WHEN THE SEIZURE CONSTITUTES A SUBSTANTIAL VIOLATION OF RIGHTS AND ONLY AFTER THE COURT WEIGHS THE QUESTION OF EXCLUSION IN LIGHT OF THE PUBLIC INTEREST IN OBTAINING RELIABLE EVIDENCE FOR THE PROSECUTION OF SERIOUS CRIMES OF VIOLENCE.

I.

The exclusionary rule in search and seizure cases has been the subject of intense debate throughout its existence. The commentary is substantial.

The historical and logical foundations of the rule have been ably and persuasively criticized. See *Wigmore*, "Using Evidence Obtained by Illegal Search and Seizure", 8 A.B.A.J. 479 (1922); Plumb, "Illegal Enforcement of the Law", 24 Cornell L.Q., 337, 354-58, 370-81 (1939); Wigmore, *Evidence*, Secs. 2183-84a (McNaughton Rev. 1961). Nearly every civilized nation in the world has survived as a civilized nation without the benefit of the exclusionary rule. See "The Exclusionary Rule Under Foreign Law" 52 J. Crim. L. C. & P.S. 270 (1961). (series of articles). To our knowledge, no civilized nation has an absolute rule which mandates the exclusion of evidence regardless of social interests which support its admission. See *Lawrie* v. *Muir* [1950] Scots L.T.R. 37.

The policy arguments against the rule have been well stated. See Burger, "Who Will Watch the Watchman", 14 Am. U. L. Rev. 1 (1964); Oaks, "Studying the Exclusionary Rule In Search and Seizure", 37 U. Chi. L. Rev. 665 (1970). And concern over the validity of the rule has not been confined to academicians, prosecutors and policemen

in recent years. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 (1971) (Burger, C. J. dissenting); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 490, 493, 510 (1971) (Harlan, J. concurring) (Black and Blackmun, JJ, concurring and dissenting).

II.

At the risk of repeating what has been said before, we think it appropriate to restate our objections to the exclusionary rule.

On ethical grounds, the rule in its direct application, seems unfair. It benefits only the guilty. The innocent man whose rights are violated must sue civilly to secure damages; he must pursue a remedy that this Court has found to be ineffective. Further, the application of the rule punishes society and not the offending officer.

In terms of judicial administration, the rule requires diversion from the fundamental concerns of guilt or innocence. At the very least, the determination of the ultimate question is substantially delayed and witnesses for both sides become discouraged or unavailable. At the worst, counsel for defendants become so concerned with the question of suppression that they never seriously prepare for trial or explore defenses on the merits.

The public perception of the delay, the procedural gamesmanship and the clear benefit to the guilty serves to diminish confidence in the courts.

The exclusionary rule creates a haven for a corrupt policeman or prosecutor. The rule allows the officer to immunize an offender while appearing to do an aggressive job of law enforcement. An officer may conduct a massive gambling raid without securing adequate evi-

dence of probable cause. The officer appears to be doing his job cracking down on gambling only to be frustrated by the courts. The officer may reap both the benefits of public approval and consideration from the gambler. One study found that "an examination of the records and a period of observation of this practice in the court is fairly convincing that the raids are made to immunize the gamblers while at the same time satisfying the public that gamblers are being harassed by the police." Dash, "Cracks in the Foundation of Criminal Justice," 46 Ill. L. Rev. 385, 392 (1951). See also, Peterson, "Restrictions in the Law of Search and Seizure," 52 NW. L. Rev. 45, 57-58, 58-59 (1957). The courts are compromised by aiding this kind of corruption. And the courts, not the police, are the recipients of public disapproval when they suppress meaningful, or overwhelming evidence. The corrupt policeman blames the courts for his ineffectiveness and the courts cannot respond.

The exclusionary rule is thought to deter illegal police conduct. There is no evidence that proves this is so. See Oaks, " Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665 (1970). The fact that there is no proof of deterrence should cause the rule to be abandoned. If due process requires the exclusionary rule, it would seem clear that the proponent of the rule ought to sustain the burden. It seems clear to us that even without statistics a realistic analysis of the incentives and pressures upon the police would show that the exclusionary rule cannot deter.

The primary pressure upon the police is to apprehend criminals and prevent crime. It is an unceasing public pressure which arises not from some irrational public prejudice but from the indisputable assessment that

crime is both an ethical and social evil.[1] Further, there is the internal standard of every ordinary man in law enforcement that murderers, robbers, etc., ought to be punished for their crimes. The effect of the exclusionary rule in search and seizure cases is not deterrence but perjury. The rule fosters false testimony by law officers who feel they must apprehend offenders and are fearful that minor technical errors will result in their escape. In short, police officers who would not alter their testimony in any respect to help the prosecution establish guilt may well be driven to such extremes when the question is not one of guilt but rather of the admissibility of reliable evidence.

There are institutional pressures which work against deterrence. The police organizational structure asks the policeman why he didn't arrest rather than why he did.[2] The police encourage seizure of contraband and place a premium on police alertness. The desire to prevent crime often causes the police to engage in practices which are not permitted when the object is the prosecution of offenders. The police structure is responsive to public

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1. There are similar pressures upon courts to distort probable cause concepts in order to sustain the admissibility of evidence. See Brinegar v. United States, 338 U.S. 160, 183 (1949).

2. One eminent judge has adopted a standard for search and seizure which reflects this concern: "When a police officer could justifiably be disciplined for failure to act, his action can hardly be characterized as unreasonable." People v. Moore, 35 Ill. 2d 399, 403, 220 N.E. 2d 443, 445 (1966) (Schaefer, J.).

norms. The police do not feel morally blameworthy because the public does not condemn. See Skolnick, *Justice Without Trial*, 219-26 (1966). La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 442-44 (1965).

It is this abiding, powerful and rational pressure to suppress crime that leads police to prefer, in many cases, to engage in the forbidden practices and forego prosecution. The Court has recognized the inability of the rule to deter in certain contexts. See *Terry* v. *Ohio*, 392 U.S. 1, 12-15 (1968). Studies have shown that the police have an incentive to arrest without any thought of conviction. An arrest disrupts illegal business and clears the streets for a time. Narcotics and weapons are destroyed and the arrestee bears the costs of freeing himself through court action. See La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 422-29, 447-55 (1965); Waite, "Police Regulation by Rules of Evidence," 42 Mich. L. Rev. 679, 685-87 (1944). It is important to reiterate that the police do not act out of malice, they act because the public demands that they act and that demand is more forceful than the demands made by judges.

It is our view that the only effective control upon police conduct is the community in which the police function. Excesses and abuses of police power occur rarely because the citizens will not tolerate them, not because the police fear that months later a judge will suppress

evidence they seize. In our experience, the only effective means of changing police procedures which aggrieve segments of the community is by community pressure. The exclusionary rule has been in effect in Illinois since 1923 and yet there is no evidence that complaints concerning police abuses have diminished. In one city in Illinois, it is claimed that one minority group is persistently harassed by police. Though many allegations have proven unfounded, there have apparently been enough incidents to cause several changes in police procedure and high ranking personnel. The incentive for change was not a new rule of court or a far-reaching opinion but rather the pressure of citizens groups. In light of several recent jury verdicts acquitting unpopular defendants, it seems absurd to argue that the community will tolerate police excesses against minority groups.

In this connection, it is worth observing that an officer who acts in good faith is not going to be deterred by the exclusionary rule. See Horowitz, "Excluding the Exclusionary Rule," 47 L.A. Bar Bull. 91, 92 (1972). By definition, such an officer acts because he thinks, albeit mistakenly, that he is acting within the law. The officer who acts in bad faith will not be deterred, either. "The officer who takes bribes or shakes down prisoners, or extorts money on threat of arrest, or brutally mistreats prisoners or otherwise consciously abuses his authority can be controlled only by the imposition of direct penalties . . . the exclusionary rule has no impact in such a situation." Barrett, "Exclusion of Evidence Obtained by Illegal Searches," 43 Calif. L. Rev. 565, 592-93 (1955).

The incentives and pressures which work against the exclusionary rule are not the only factors which account for its limited value as a tool of deterrence. The rule

itself is applied in a context inimical to its purposes. There is, first, a distinct failure to communicate the rules of search and seizure laid down by courts to the police in a manner comprehensible to the police. La Fave and Remington, "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions," 63 Mich L. Rev. 987, 991-93, 1003-1008 (1965). There is also the admitted failure of courts to prescribe consistent and comprehensible rules governing search and seizure. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 483 (1971). It may be inherently impossible to devise coherent Fourth Amendment precepts. If that is the case then the exclusionary rule is clearly out of place. It is unreasonable to expect deterrence when the subject does not know what he is forbidden to do. The lack of clarity in the law contributes to both public and police disrespect for the rules of search and seizure. Nothing is more incomprehensible to the policeman who accepts judicial supervision of searches by securing a warrant than to have another court say that the first court was wrong in issuing the warrant. See La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 411-415 (1966).

There is a particularly striking and inexplicable anomaly in our treatment of police officers vis a vis lawyers. We excuse a lawyer who mistakenly judges a law to be constitutional and advises his client to plead guilty. See *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970). Yet by a divided court we condemn a police officer who decides to search upon his mistaken judgment that he has met the requirements of the law. It is unfair to tax an officer, usually a layman, with the endless permutations of search and seizure law. The appearance to the officer is that the law is capricious and meaningless, an attitude which scarcely encourages eager compliance.

III.

Many who recognize the validity of objections to the rule will advocate that the rule not be abandoned until a reasonable alternative is provided. The most popular suggestion for an alternative is to provide a remedy reminiscent of Industrial Commission (Workmen's Compensation) procedures. See Horowitz, "Excluding the Exclusionary Rule, Can There Be an Effective Alternative," 47 Los Angeles Bar Bull. 91, 94 et seq. (1972); Barrett, Exclusion of Evidence Obtained By Illegal Searches, 43 Calif. L. Rev. 565, 594-95 (1955). *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 422-23 (1971) (Burger C.J. dissenting).

It seems to us that concern over a viable alternative should not prevent this Court from reconsidering the exclusionary rule. If the exclusionary rule were effective and meaningful as a deterrent, it might be proper to ponder the necessity for replacing it with something else. But it appears that the exclusionary rule cannot and does not serve the purpose of deterrence. If the exclusionary rule has no deterrent effects, its absence will not leave a void to be filled. It might be said that an outright abolition of the exclusionary rule may have a symbolic effect and encourage police abuse. We doubt that this would occur. The public resentment of arbitrary police conduct is now and will remain a primary restraint on the police. Further, the continuation of the exclusionary rule will encourage the other police abuses attendant upon the administration of the rule.

This Court need not resolve the issues presented by a complete abandonment of the exclusionary. Instead, a more modest approach can and ought to be pursued.

The exclusionary rule in federal cases was adopted in *Weeks* v. *United States*, 232 U.S. 383 (1914). The crime there was use of the mails to transport lottery tickets. The police action there was conducted without any authority. It consisted of a complete search of the room of the defendant in his absence and a seizure of his private letters and correspondence and other private papers. Under the rule in *Boyd* v. *United States*, 116 U.S. 616 (1886), the seizure may well have violated the Fifth Amendment.

The exclusionary rule was imposed upon the States in *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The conduct of the police in that case can properly be characterized as flagrant. The offense charged could not today be constitutionally classified as a crime. See *Stanley* v. *Georgia*, 394 U.S. 557 (1969). The Court held that it must exclude "evidence secured by official lawlessness in flagrant abuse of that basic right [of privacy]" 367 U.S. at 654-55.

The nature of police conduct in both *Weeks* and *Mapp* was exceptionally violative of the suspect's rights. Indeed, in neither case, did the officers attempt to defend their actions on the merits or as taken in good faith. No rationale appears in either case for applying the exclusionary rule to reasonable, good faith but erroneous action by the police.

Judge Friendly has suggested that "the object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or flagrantly illegal—where there was no reasonable cause to believe there was reasonable cause." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 952 (1965). See also A.L.I. *Model Code of Pre-Arraignment Procedure*, §8.02 (2) (Tent. Draft No. 4, 1971). It

appears to us at least that this is what *Mapp* said. When Mr. Justice (then Chief Judge) Cardozo rejected the idea that the criminal should go free because the constable "blundered"[3] he meant exactly what he said. A blundering constable was not the subject of *Mapp*, rather there a deliberate, methodical violation of a suspect's rights was involved.

The exclusionary rule ought to be applied also in light of the severity of the crime involved. Justice Cardozo's opinion in *People* v. *Defore* is often cited but there is significant language in the opinion of Justice Finch in the Appellate Division opinion:

> "To be unable to find a murderer guilty, although competent evidence is before the court to warrant a conviction, for the reason that someone else is guilty of petty larceny in connection with obtaining such evidence seems a handicap rather than a help to the administration of justice." *People* v. *Defore*, 213 App. Div. 643, 652; 211 N.Y.S. 134, 142 (1925).[4]

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3. People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

4. " . . . judicial exceptions . . . should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger." Brinegar v. United States, 338 U.S. 160, 183 (Jackson J. dissenting).

The ethical quandry posed by the application of the exclusionary rule without regard to the nature of the crime involved is a significant one. "However much we may be revolted by the methods used by the police to obtain the evidence we cannot rationally say that the defendant whose crime may be at least equally revolting should have a personal right to go free as a result." The exclusionary rule assumes "that the policeman's action always involves a greater social evil than the defendant." Barrett, *Exclusion of Evidence Obtained By Illegal Searches*, 43 Calif. L. Rev. 565, 581 (1955).

Here, in the *Gustafson* case, the crime does not involve violence nor an offense against the person. We would freely admit that the offense in this case would not be a factor requiring the relaxation of the exclusionary rule. Nevertheless, it is a factor that ought to be considered whether it weighs in favor of the prosecution or the defense.

The *Robinson* case, however, involves a more serious offense. Respondent, at the time of his arrest, was in possession of an addictive drug—heroin—in a quantity in excess of that which might be presumed to be for personal use. The offense charged in *Robinson*, thus clearly would be a factor requiring the relaxation of the exclusionary rule.

The other factor that ought to be considered is the nature of the police conduct. In these cases, it is clearly inappropriate to characterize the police conduct as flagrant, deliberately abusive of basic rights or intentionally violative of obvious rules governing search and seizure.[5]

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5. Indeed, in the Robinson case, the police officer conducted the search of respondent pursuant to a Police Department instruction requiring all officers to make a complete field search at the time of any full custody arrest. United States v. Robinson, 471 F. 2d 1082, 1088, fn. 5 (D.C. Cir. 1972).

It is difficult to characterize police conduct approved by five justices of the Supreme Court of Florida and by four judges of the United States Court of Appeals for the District of Columbia Circuit as flagrant and obviously illegal.

It has never been adequately explained why a case like *Mapp* involving extremely flagrant police misconduct used for the prosecution of the most trivial offense leads to the suppression of evidence seized with probable cause in good faith reliance upon a statutorily authorized warrant used for the prosecution of murder as in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971). Without that explanation the rule should never have been extended to its present breadth.

We do not ask now for the overruling of *Mapp;* we ask that the exclusionary rule be limited to those cases like *Mapp* which caused the rule to be promulgated. The exclusionary rule has assumed a scope far beyond the justifications offered when it was put upon the States. There is no valid rationale for its automatic extension to all classes of cases regardless of the nature of the police conduct and the gravity of the crime. As a minimum measure, the reach of the rule should be reduced to conform with the reasons offered for the rule in *Mapp.*

CONCLUSION

The People of the State of Illinois, as amicus curiae, respectfully urge the reversal of the judgment below in *United States* v. *Robinson*, and affirmance of the judgment below in *Gustafson* v. *Florida*, and the adoption of the suggested modifications of the rule in *Mapp* v. *Ohio*.

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GUSTAFSON *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 71-1669. Argued October 9, 1973—Decided December 11, 1973

During the course of a patdown search of the person of petitioner, who had been arrested for not having his driver's license in his possession, the arresting officer seized marihuana cigarettes, for the unlawful possession of which petitioner was subsequently tried and convicted. The State Supreme Court upheld the conviction, concluding that the search leading to the discovery of the marihuana, which was used as evidence in petitioner's trial, was not unreasonable.

Held: The full search of the person of the suspect made incident to a lawful custodial arrest did not violate the Fourth and Fourteenth Amendments, *United States* v. *Robinson*, *ante*, p. —, and it is of no constitutional significance that, contrary to the situation in *Robinson*, police regulations did not require that petitioner be taken into custody or establish the conditions under which a full-scale body search should be conducted, nor, as in *Robinson*, is it relevant that the arresting officer had no subjective fear of petitioner or suspect that he was armed, since it is the fact of custodial arrest which gives rise to the authority to search. Pp. 3-6.

258 So. 2d 615, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. STEWART and POWELL, JJ., filed concurring opinions. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 71-1070

GUSTI DIXON v. FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

[June 27, 1972] Argued October 2, 1972—Decided December 11, 1972

During the course of a parole search of the person of petitioner, who had been arrested for not having his driver's license in his possession, the arresting officer seized marijuana cigarettes from the immediate possession of which petitioner was subsequently tried and convicted. The State Supreme Court upheld the conviction, finding that the search leading to the discovery of the marijuana, which was then in evidence at petitioner's trial, was unobjectionable.

Held: The full search of the person of the suspect made incident to a lawful custodial arrest did not violate the Fourth and Fourteenth Amendments. *United States v. Robinson*, ante, p. —, and *Gustafson v. United States*, ante, p. —, are applicable to the circumstances that, contrary to the situation in petitioner's case, regulations did not require that petitioner be taken into custody or establish the conditions under which a full search of the person could be conducted nor as in *Robinson*, is it shown that the arresting officer had no subjective fear of personal danger or anything that he was trying to do but conduct a search which gives rise to the assertion. [Pp. 3–6.]

[Footnotes omitted.]

Per Curiam.

Petitioner, a driver of the truck in which [illegible] C. J., and Stevens, Blackmun, and Powell, JJ. joined. Stewart and Thomas, JJ. filed concurring opinions. Douglas, J., filed a dissenting opinion in which Brennan and Marshall, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1669

James E. Gustafson, Petitioner, v. State of Florida. | On Writ of Certiorari to the Supreme Court of Florida.

[December 11, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner James Gustafson was convicted in a Florida trial court for unlawful possession of marihuana. At his trial the State introduced into evidence marihuana which had been seized from him during a search incident to his arrest on a charge of driving without an operator's license. The District Court of Appeal of Florida, Fourth District, reversed petitioner's conviction, holding that the search which had led to the discovery of the marihuana was unreasonable under the Fourth and Fourteenth Amendments. *Gustafson* v. *State*, 243 So. 2d 615 (4th D. C. A. Fla. 1971). The Supreme Court of Florida in turn reversed that decision, *State* v. *Gustafson*, 258 So. 2d 1 (Fla. 1972), and petitioner sought certiorari in this Court. We granted certiorari, 410 U. S. 982 (1973), and set the case for argument with No. 72-926, *United States* v. *Robinson*, also decided today, *ante*, p. —. For the reasons set forth below, we affirm the judgment of the Supreme Court of Florida.

At approximately 2 a. m., on January 12, 1969, Lieutenant Paul R. Smith, a uniformed municipal police officer of Eau Gallie, Florida, was on a routine patrol in an unmarked squad car when he observed a 1953 white Cadillac, bearing New York license plates, driving

south through the town. Smith observed the automobile weave across the center line and back to the right side of the road "three or four" times. Smith testified that he observed the two occupants of the Cadillac look back; after they apparently saw the squad car, the car drove across the highway and behind a grocery store, and then headed south on another city street.

At that point Smith turned on his flashing light and pulled the Cadillac over to the side of the road. After stopping the vehicle, Smith asked petitioner, the driver, to produce his operator's license. Petitioner informed Smith that he was a student and that he had left his operator's license in his dormitory room in the neighboring city of Melbourne, Florida. Petitioner was then placed under arrest for failure to have his vehicle operator's license in his possession. It was conceded by the parties below and in this Court that the officer had probable cause to arrest upon learning that petitioner did not have his license in his possession, and that he took petitioner into custody in order to transport him to the stationhouse for further inquiry.[1]

Smith then proceeded to search the petitioner's person. Smith testified that he patted down the clothing of the petitioner, "outside and inside, I checked the belt, the shirt pockets and all around the belt, completely around the inside." Upon completing his patdown, he testified, he placed his hand into the left front coat pocket of the coat petitioner was wearing. From that pocket he extracted a "long chain" and a Benson and Hedges cigarette box. Smith testified that he then "opened [the cigarette box] and it appeared there were marijuana cigarettes in the box.[2] I had been shown this in training

[1] Brief for the Petitioner, at 9.

[2] Upon placing petitioner under arrest for driving without possession of an operator's license and after removing the chain and the cigarette box from petitioner's clothing, Smith told the assisting

at the police department and these appeared to be marijuana to me."

I

Petitioner urges that there could be no evidentiary purpose for the search conducted by Smith, and therefore the authority to search for weapons incident to a lawful arrest is controlled by the standards laid down in *Terry* v. *Ohio*, 392 U. S. 1 (1968). Petitioner contends that this case is different from *United States* v. *Robinson*, *ante*, at p. —, in that petitioner had experienced no previous encounters with the officer in this case, and the offense for which he was arrested was "benign or trivial in nature," carrying with it no mandatory minimum sentence as did the offense for which Robinson was arrested. Petitioner points out that here, unlike *Robinson*, there were no police regulations which required the officer to take petitioner into custody, nor were there police department policies requiring full scale body searches upon arrest in the field. Petitioner also points to the fact that here, as in *Robinson*, the officer expressed no fear for his own well-being or for that of others in dealing with the petitioner.

We have held today in *United States* v. *Robinson* that "it is the fact of the lawful arrest which establishes the

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officer on the scene to check the other passenger of the Cadillac to see if he had an operator's permit so that he could drive the car to the station. Smith then put petitioner in the back seat of the squad car. Smith then opened the cigarette box and observed the rolled cigarettes he believed to be marihuana. He then told the other officer to place the other passenger in the squad car so that he could also be transported to the station, for the purpose of investigation. The passenger was frisked by the other officer and placed in the squad car; no charges were placed against the passenger. In addition to the marihuana conviction which we here review, petitioner was charged with driving without possession of an operator's license; that charge was dropped when petitioner produced a valid operator's license at a later date.

authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Ante*, at —. Our decision in *Robinson* indicates that the limitations placed by *Terry* v. *Ohio*, *supra*, on protective searches conducted in an investigatory stop situation based on less than probable cause are not to be carried over to searches made incident to lawful custodial arrests. We stated in *Robinson*:

> "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial. *Agnello* v. *United States*, *supra*; *Abel* v. *United States*, 362 U. S. 217 (1960). The standards traditionally governing the search incident to lawful arrest are not, therefore, commuted to stricter *Terry* standards by the absence of probable fruits or further evidence of the particular crime for which the arrest is made." *Ante*, at —.

Neither *Chimel* v. *California*, 395 U. S. 752 (1969), nor *Peters* v. *New York*, 392 U. S. 40 (1968), relied upon by petitioner, purported to limit the traditional authority of the arresting officer to conduct a full search of the person of an arrestee incident to a lawful custodial arrest. *United States* v. *Robinson*, *ante*, at —. Indeed, as our decision in *Robinson* indicates, not only has this been established Fourth Amendment law since the decision in *Weeks* v. *United States*, 232 U. S. 383 (1914), but it was also the rule both at common law and in the early development of American law. *United States* v. *Robinson*, *ante*, at —.

Though the officer here was not required to take the petitioner into custody by police regulations as he was in *Robinson*, and there did not exist a departmental policy establishing the conditions under which a full scale body search should be conducted, we do not find these differences determinative of the constitutional issue. *Id.*, at ——.[3] It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest and placed the petitioner in custody. In addition, as our decision in *Robinson* makes clear, the arguable absence of "evidentiary" purpose for a search incident to a lawful arrest is not controlling. *Id.*, at ——.[4] "The authority to search a person incident to a lawful custodial arrest, while based upon the need

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[3] Smith testified that he wrote about eight to 10 traffic citations per week, and that about three or four out of every 10 persons he arrested for the offense of driving without a license were taken into custody to the police station. Smith indicated that an offender is more likely to be taken into custody if he does not reside in the city of Eau Gaille. Finally, Smith testified that after making a custodial arrest, he always searches the arrestee before placing him into the patrol car.

[4] The State of Florida argues in this Court that there was an evidentiary purpose for the search of petitioner. It is contended that Smith's observation of the erratic motions of the car that petitioner was driving created a reasonable suspicion that the petitioner may have been under the influence of some intoxicant. Upon confronting petitioner after stopping the car, Smith indicated that he noticed that the petitioner's eyes were "bleary." The State argues that the officer had probable cause to arrest the petitioner for driving while intoxicated, and that Smith thought Gustafson was intoxicated when he confronted him. Since Smith did not detect an odor of alcohol during that confrontation, the State argues it was reasonable for the officer to search the petitioner's person for drugs that may have been the cause of the suspected intoxication. Florida makes it a criminal offense to drive while intoxicated not only by alcohol, but also by unlawful drugs. Fla. Stats. § 317.201.

to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.*, at ——.

II

We hold therefore that upon arresting petitioner for the offense of driving his automobile without a valid operator's license, and taking him into custody, Smith was entitled to make a full search of petitioner's person incident to that lawful arrest. Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that Smith did not indicate any subjective fear of the petitioner or that he did not himself suspect that the petitioner was armed. Having in the course of his lawful search come upon the box of cigarettes, Smith was entitled to inspect it; and when his inspection revealed the homemade cigarettes which he believed to contain an unlawful substance, he was entitled to seize them as "fruits, instrumentalities or contraband" probative of criminal conduct. *Harris* v. *United States*, 331 U. S. 145, 154–155 (1947); *Warden* v. *Hayden*, 387 U. S. 294, 299, 307 (1967); *Adams* v. *Williams*, 407 U. S. 143, 149 (1972); *United States* v. *Robinson*, *ante*, at——. The judgment of the Supreme Court of Florida is therefore

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 71–1669

James E. Gustafson, Petitioner, v. State of Florida.	On Writ of Certiorari to the Supreme Court of Florida.

[December 11, 1973]

MR. JUSTICE STEWART, concurring.

It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made. Instead, the petitioner has fully conceded the constitutional validity of his custodial arrest. That being so, it follows that the incidental search of his person was also constitutionally valid. To hold otherwise would, as the Court makes clear in this case and in *United States* v. *Robinson*, *ante*, p. —, mark an abrupt departure from settled constitutional precedent.

SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF THE UNITED STATES

No. 71-1669

James E. Gustafson, Petitioner, v. State of Florida. | On Writ of Certiorari to the Supreme Court of Florida.

[December 11, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

I respectfully dissent for the reasons stated in my opinion in *United States* v. *Willie Robinson, Jr., ante,* at —. The facts show that after arresting petitioner Gustafson for driving without possession of an operator's license, Officer Smith conducted a search of petitioner's person in which he removed a Benson and Hedges cigarette box. The officer put petitioner in the back seat of the squad car and then opened the cigarette box, disclosing marihuana cigarettes. As my Brother STEWART indicates, *ante,* at —, no challenge was made either here or below with respect to the lawfulness of Officer Smith's decision to effect a full custodial arrest for this minor traffic offense. Whether or not it was lawful for the officer to have searched petitioner's person and removed the cigarette package before placing petitioner in the squad car, see *United States* v. *Willie Robinson, Jr., ante,* at — - — (MR. JUSTICE MARSHALL, dissenting), there was no justification for his opening the package and looking inside.

There was no reason to believe, and Officer Smith did not in fact believe, that petitioner was a dangerous person or that the package contained a weapon. The package's weight alone no doubt would have indicated that it did not contain a gun or knife. In any event, even were it possible that the package contained some

sort of weapon—say a razor blade—there was no chance the petitioner could use it once it was in the officer's hands. The opening of the package had no connection whatsoever with the protective purpose of the search.

The State argues, and the Florida Supreme Court found, see 258 So. 2d 1, 2 (Fla. 1972), that Officer Smith had a reasonable suspicion petitioner was intoxicated, justifying searching for intoxicating drugs such as marihuana. Leaving aside the question whether the officer could search for intoxicants absent probable cause that petitioner had committed an offense involving intoxication, I do not find sufficient evidence in this record to support the conclusion that Officer Smith even had a reasonable suspicion petitioner was intoxicated. To begin with, Officer Smith neither arrested petitioner for driving while intoxicated nor did he give petitioner a sobriety test. See Fla. Stats. Ann. §§ 322.261 and 322.262 (1973 Supp.). Smith testified that petitioner did not have any trouble getting out of his car, did not have difficulty standing up, and did not slur his speech when answering the officer's questions. Nor did the fact that petitioner's car weaved across a lane justify such a suspicion. As Officer Smith testified, he did not arrest petitioner on a careless driving by weaving charge because there was simply not enough evidence. If there was not enough evidence to justify a charge for the weaving itself, I find it hard to understand how there could be enough evidence to suspect that petitioner was intoxicated. Officer Smith testified that petitioner's eyes looked bleary, but that was hardly surprising, since the arrest took place at 2 a. m.

The only need for a search in this case was to disarm petitioner to protect Officer Smith from harm while the two were together in the patrol car. The search conducted by Officer Smith went far beyond what was

reasonably necessary to achieve that end. It therefore fell outside the scope of a properly drawn "search incident to arrest" exception to the Fourth Amendment's warrant requirement. I would reverse the judgment of the Florida Supreme Court holding that the fruits of the search could be admitted at respondent's trial.